

STUDIES  
IN THE CONSTITUTION  
*of the* IRISH FREE STATE

*By*

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I DEDICATE THIS BOOK TO

DENIS JOSEPH COFFEY

M.A., M.B., B.Ch., B.A.O., LL.D.,

PRESIDENT, UNIVERSITY COLLEGE, DUBLIN,

AS A TRIBUTE OF  
HIGH ESTEEM, PERSONAL AFFECTION AND  
GRATITUDE FOR UNCEASING KINDNESS  
AND UNCLOUDED FRIENDSHIP  
EXTENDING OVER A GREAT NUMBER OF YEARS.





I HAVE endeavoured in these pages while explaining and expounding the leading principles, as I understand them, of the Constitution of the Irish Free State to direct attention to the distinctions highly favourable to the Free State Constitution between that Constitution and the British Constitution and the systems of government of which the British Constitution is the prototype.

I have been thus led by an easy and almost unconscious transition to the consideration of the relations between the Irish Free State and the other co-equal members, including Great Britain, of the British Commonwealth of Nations, and thence to the consideration of the relations between the Irish Free State and the other Sovereign Powers produced by the entrance of the Irish Free State into the membership of the League of Nations.

The Constitution of the Irish Free State interpreted by the Treaty is the charter of the status of the Irish Free State as an independent Sovereign Power entitled to assert and maintain its position among the nations of the world.

I venture to hope that this treatise, primarily addressed to students of constitutional law and history who intend to become members of one or other of the branches of the Legal Profession, may perhaps obtain a wider circle of readers. The study of the Constitution of the Irish Free State should be an elevated intellectual recreation to every citizen. That study should, I think, form an important part of the curriculum in schools and colleges, with the view of enabling young people early in life to take an intelligent and appreciative interest in the working of the governing institutions of their country, in the development of those institutions, and in the contrivances of extraordinary skill and ingenuity whereby popular rights and liberties have been secured, and the people have become virtually the masters of the Irish Legislature, and through that Legislature of the Executive Council which is itself subject to the power of an independent Judiciary invested with the means of putting a veto on any administrative action unauthorised by the letter of the law.

If a perusal of these pages will contribute to awaken an interest in the Constitution of the Irish Free State and its almost illimitable potentialities, I will be content and thankful.

J. G. SWIFT MACNEILL.

*Dublin, February, 1925.*

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## INTRODUCTION

I have used as an Introduction an article entitled, "Thoughts on the Constitution of the Irish Free State," which I contributed to *The Journal of Comparative Legislation and International Law*, in February, 1923. In the following pages I have in some cases repeated and enlarged on matters dealt with in this general view of the subject presented by the Introduction, which I have preferred to leave in its original form.

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THE establishment of the Constitution of the Irish Free State is, since the construction of the Constitution of the United States, the most momentous achievement in the history of the governing institutions based on the great prototype of the British Constitution.

The first article of the Irish Constitution declares that the Irish Free State is a co-equal member of the community of nations forming the British Commonwealth of Nations. The entrance of Ireland into that

Commonwealth of nations confirms and strengthens — it even elevates—the rank, the status, the nationhood of every member of that community. Ireland, it must be remembered, unlike the other members of the British Commonwealth of Nations, was never a dependency of Great Britain. Ireland was always a nation. Ireland had a Parliament as old as the Parliament of England. That Parliament existed not as a favour, a concession, or a grant, but as the inherent right of freedom. From the admitted principle that the Crown of Ireland was appendant and inseparately annexed to the Crown of England came the claim of the English Parliament to legislate for Ireland. Over all the other colonies and dependencies of the British Crown the British Parliament had exercised the right of legislation. Over Ireland that Parliament asserted the same right, which was fiercely and successfully contested and was finally abandoned in 1782, when the Irish House of Commons, in an Address to the Lord Lieutenant, claimed in reference to the struggle then concluded that the sole and exclusive right of legislation, external as well as internal, had been firmly asserted on the part of Ireland and unequivocally acknowledged on the part of Great Britain. The Irish Constitution of 1782 admitted the equality in dignity of the two kingdoms of Great Britain and Ireland and the independence of their respective Legislatures. The equality of the two kingdoms of Great Britain and Ireland was acknowledged by the Union which created one United Kingdom. The establishment of the Irish Free State preserves to Ireland her position and indefeasible status as an independent nation, and her entrance into the British Commonwealth of Nations

as an equal member of that Commonwealth confirms and strengthens the status of each member of that Commonwealth as an independent nation—"in the fulness," to use the words of Mr. Healy, the Governor-General, "of partnership in liberty with the nations co-operating in equal membership of a great Commonwealth of free peoples."

A perusal, however cursory, of the Constitution of the Irish Free State will show that the framers of that Constitution took as their model, like the framers of the American Constitution, the British Constitution of their own times and endeavoured to improve on that model. The British Constitution of 1789, on which Jefferson and his associates worked in the framing of the American Constitution was, however, essentially different from the British Constitution of 1922, on which the framers of the Irish Constitution worked.

Since the time of George III, by the process of constitutional development, then in its infancy, there has grown up by the side of our written law an unwritten and conventional Constitution. As distinct from the positive law of the British Constitution, there are conventions of the Constitution and constitutional morality consisting of maxims and practices which, though they regulate the ordinary conduct of the Crown and its Ministers, and every detail, in short, of the practical working of Government, are not laws in the true sense of the word, for if any or all of them were broken no Court would take notice of their violation, although their breach would almost immediately bring the offender into conflict with the law of the land. Professor Dicey, having given some

instances of the rules which belong to the conventions as distinct from the laws of the Constitution, hazarded the conjecture, writing thirty years ago, that under a new or written Constitution some of them would take the form of actual laws. The framers of the Constitution of the Irish Free State have fulfilled Professor Dicey's anticipation by the conversion of many of the principal conventions of the British Constitution into the positive law of the Irish Free State, while in many instances they, like the framers of the American Constitution, have improved on the British Constitution as they found it.

The Constitution of the Irish Free State incorporates so many of the conventions of the British Constitution and variations of these conventions, indicative in themselves of the trend of opinion in the direction of reform of governing institutions, as to present a subject for fruitful contemplation to the student of constitutional development and of the ethics of comparative jurisprudence.

I take a few illustrations of the conversion of the conventions of the British Constitution into the positive law of the Irish Free State Constitution in which that instrument abounds. It might indeed be utilized as a valuable list of political maxims universally acknowledged and carried out in the practice of the British Constitution, but not found among the formal Acts of the British Legislature nor forming part of the law of Great Britain.

The convention of the British Constitution whereby Parliament meets at least once a year is due to the need of the appropriation of supply, and of the Army Act, which makes it legally necessary for Parliament



to sit once a year. That convention becomes positive law in the Irish Free State Constitution, while the date of the reassembly of each House of the Irish Legislature and the date of the conclusion of the session—matters which, in the words of the Speaker of the House of Commons on December 15, 1922, are for the Crown in the British Constitution, are in the Irish Free State Constitution largely placed in the discretion of the Dáil Eireann or Chamber of Deputies. "The Oireachtas [Irish Legislature] shall hold," says the Constitution, "at least one session every year. The Oireachtas shall be summoned and dissolved by the Representative of the Crown in the name of the King, and subject as aforesaid Dáil Eireann shall fix the date of the conclusion of each session of each House. Provided that the sessions of Seanad Eireann (the Senate) shall not be concluded without its own consent" (Art. 24). It is moreover provided that Dáil Eireann may not at any time be dissolved except on the advice of the Executive Council (Art. 28). The conduct of the English House of Commons under the leadership of Sir John Eliot in the memorable scene on March 2, 1629, in keeping the Speaker in the Chair as a protest against the command of Charles I to him to direct the House to adjourn is vindicated by anticipation under the provisions of the Irish Constitution by which Dáil Eireann is empowered not merely to control its own adjournments—an undoubted parliamentary privilege—but to control the prorogation and the time of the reassembling of the Irish Legislature.

Again, one of the fundamental principles of parliamentary government is in the British Constitution not

a law but a mere convention, although it is embodied in the Standing Orders of the House of Commons. That convention is incorporated in the following Article (37) of the Irish Constitution as positive law: "Money shall not be appropriated by vote, resolution, or law unless the purpose of the appropriation has in the same session been recommended by a message from the Representative of the Crown acting on the advice of the Executive Council." Three Standing Orders of the British House of Commons, made in the early years of the eighteenth century, which for upwards of a hundred years were the only Standing Orders ordained for the self-government of that assembly, have established the practice which has been faithfully maintained, that any motion which creates a charge upon the public revenue must receive the recommendation of the Crown. By this practice the great constitutional principle has been established and maintained that the Sovereign, having the executive power, is charged with the management of all the revenue of the State and with all payments of the public services. Thus, the Crown demands money, the Commons grant it, and the Lords (subject to the provisions of the Parliament Act, 1911) assent to the grant; but the Commons do not vote money unless it is required by the Crown, nor do they impose or augment taxes unless it is declared by the Crown through its constitutional advisers that such taxation is necessary. That great principle, whose non-observance would render parliamentary government on the basis of the party system wholly impossible owing to the pressure from without to which unofficial members would be subjected to obtain financial assistance for

local needs and enterprises has, however, no recognition in English law, written or unwritten. The salutary practice did not prevail even in practice in the old Irish Parliament, although it has become part and parcel of the new Irish Constitution. Thus the grant of £50,000 to Mr. Grattan in gratitude for his services in the establishment of Irish parliamentary independence in 1782, which was unanimously voted, was moved not by a Minister of the Crown but by an unofficial member.

The conventions of the British Constitution converted into positive law and embodied in some cases with amendments significant of the trend of public opinion become of especial interest in relation to the position of the President of the Council (Prime Minister) and the Executive (Cabinet) Council as defined under the provisions of the Irish Constitution.

"The rights and duties (under the British Constitution) of the Prime Minister," wrote Mr. Gladstone in 1878, "as head of the Administration are nowhere recorded. He is almost if not altogether unknown to the common law." "It is said," wrote Sir William Anson, thirty years later than Mr. Gladstone, "and said truly, that the Prime Minister is unknown to the law; no salary is attached to the office, if office it can be called; the term does not occur in any Act of Parliament nor in the records of either House. In two formal documents only does he find place. Lord Beaconsfield described himself in the Treaty of Berlin as Prime Minister of England; and on December 2, 1905, the King (Edward VII) by sign manual warrant gave to the Prime Minister place and precedence next after the Archbishop of York." "The Cabinet,"

wrote Mr. Gladstone, "lives and acts simply by understanding without a single line of written law or constitution to determine its relations to the monarch or the relations of its members to one another or to their head." "The student," wrote Sir William Anson, "will discover that the legal relations of King and Ministers or of Ministers and Parliament convey little idea of the practice. It is true that the King appoints the Ministers, but he does so on the advice of the Prime Minister. It is true that he also appoints the Prime Minister, but the Prime Minister is practically chosen for him by the opinion of the party which a general election has placed in a majority in the House of Commons." "There is," writes Mr. Gladstone, "no statute or legal usage of this country which requires that the Ministers of the Crown should hold seats in the one or the other House of Parliament. It is perhaps upon this account that whilst most of my countrymen would, as I suppose, declare it to be a becoming and convenient custom, yet comparatively few are aware how near the seat of life the observance lies, how closely it is connected with the equipoise and unity of the social forces. It is rarely departed from, even in an individual case; never, as far as my knowledge goes, on a wider scale. . . . I desire to fix attention on the identification in this country of the Minister with the member of a House of Parliament. It is as to the House of Commons especially an inseparable and vital part of our system." "There is," writes Sir William Anson, "no statutory (or legal) necessity that any one of the Ministers should be in Parliament; but in practice a Minister who could not obtain a seat in the House of Commons and who

was not and did not wish to be a member of the House of Lords could not continue to hold office for many weeks." The complete acceptance moreover of the theory that the action of the Cabinet is the action of each member, and that for the action of each member the Cabinet is responsible as a whole, is a tendency characteristic of the constitutional practice of the last fifty years, a constitutional convention whose observance is of the essence of parliamentary government. Although wholly unrecognized by law, those conventions have been converted into positive law with additions thereto of qualifications as indicative of the trend of public opinion in the Irish Free State Constitution. That Constitution thus enunciates the legal status of the Cabinet: "There shall be a Council to aid and advise in the Government of the Irish Free State, to be styled the Executive Council. The Executive shall be responsible to Dáil Eireann [an enactment of ministerial responsibility to Dáil Eireann, and through it to the electorate], and shall consist of not more than seven nor less than five Ministers [a limit to the number of Cabinet Ministers, which is in Great Britain discretionary, varying from seven in the time of Pitt to twenty-two in the time of Lloyd George] appointed by the Representative of the Crown on the nomination of the President of the Council" (Art. 51). "Those Ministers who form the Executive shall all be members of the Dáil Eireann [an application of the cardinal maxim of the British conventional Constitution that the House of Commons is the centre of political power] and shall include the President of the Council, the Vice-President of the Council and the Minister in charge of the Department of Finance [a

provision in accordance with British constitutional practice by which a seat in the Cabinet is attached to the holding of certain offices]" (Art. 52). "The President of the Council shall be appointed [by the Crown] on the nomination of Dáil Eireann" (Art. 53). The constitutional practice in respect to the appointment of a Prime Minister in the English Constitution is here bereft of formalities, reduced to reality. "The House of Commons is an electoral chamber," wrote Mr. Bagehot in 1865. "It is the assembly which chooses our President." The choice of a Prime Minister which Bagehot assigns to the House of Commons, in the opinion of Mr. Low, writing nearly fifty years later, has passed to the constituencies, whose members go to the House of Commons pledged to vote for a certain outstanding party leader.

The assent of Dáil Eireann to the appointment of the other Ministers who are to hold office as members of the Executive Council on the nomination of the President (Art. 53) gives an absolute selective power to Dáil Eireann, which is very limited in the case of the House of Commons, and such as is only exercisable in certain cases in which the constituencies are not particularly interested. "In one respect," writes Sir William Anson, "the House of Commons retains a certain selective function. A man must show in debate that he has some powers of speech, some dexterity in the handling of a subject, some readiness in reply in order to constitute himself a candidate for office. A Prime Minister, in filling the subordinate offices of government, will probably choose men who have shown themselves acceptable to the House. There are cases in which neither the men nor the office occupy

to an appreciable extent the attention of the electorate, and to this extent the House of Commons does exercise a real though not a dominating influence on the choice of candidates." Dáil Eireann has a "dominating influence" on the choice of candidates for subordinate offices in the Executive Council.

The provision of the Irish Constitution that the President and the other Ministers nominated by him shall retire from office should they cease to retain the support of a majority in Dáil Eireann (Art. 53) is an enunciation of the great constitutional principle embodied in the famous motion, made by Sir Robert Peel in 1841 against the Ministry of Lord Melbourne and carried by a majority of one, affirming that the Ministers of the Crown did not possess the confidence of the House of Commons and that their continuance in office under such circumstances was at variance with the spirit of the Constitution.

The provision, however, which is the most momentous departure from the practice of the British conventional Constitution and makes the relation of Dáil Eireann to the Executive Council to the very fullest extent, the relation of master to servant, is embodied in the proviso (Art. 53) that "the Oireachtas [Legislature] shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Eireann." The prerogative of dissolution is one which in Great Britain the King exercises on the advice, and at the request, of his Ministers, and a request for dissolution is not refused. Indeed, in the spring of 1922 an attempt was made to establish a doctrine for which there is not a shadow of precedent, that it was the prerogative

of the Prime Minister, independently of the consent or even of the knowledge of his colleagues in the Cabinet, to tender advice to the Crown in reference to the dissolution of Parliament. On the defeat of a Ministry in the House of Commons it is unquestionably in accordance with British constitutional practice that the defeated Ministry may appeal to the electors to decide between them and the House of Commons. On the carrying of the motion of want of confidence in Lord Melbourne's Government, to which allusion has been made, a dissolution of Parliament immediately followed and a general election in which the country declared itself adverse to the Ministers. So, too, there was an appeal to the country on the defeat of the Home Rule Bill in the House of Commons in 1886. The power of Ministers, when defeated in the House of Commons, to appeal to the country, of which the Irish Cabinet is expressly deprived, immensely increases the power of a Ministry over the House of Commons which has appointed that Ministry and whose servant it is. Mr. Bagehot thus tersely expounds this position: "The Cabinet which was chosen by one House of Commons has an appeal to the next House of Commons. Either the Cabinet legislates and acts or else it can dissolve. It is a creature, but it has the power of destroying its creators. It is an Executive which can annihilate the Legislature, as well as an Executive which is the nominee of the Legislature. It was made, but it can unmake. It was derivative in its origin, but it is destructive in its action." The influence exercisable over the House of Commons by the power of a Cabinet which has ceased to retain the support of a majority to advise a dissolution is



the measure of the value of the power vested in Dáil Eireann by the denial, under the Irish Constitution, of that power to the Executive Council. An observer so acute as Sir William Anson writes: "The weapon by which the Prime Minister or the Cabinet enforces its will upon the Commons is the threat of a dissolution. The mere intimation that if the necessary support is not given to a Government its careless or lukewarm supporters may be sent to explain their conduct to their constituents has been known to produce the desired result." Again he writes: "If a Minister is certain that Parliament will be dissolved as a matter of course on his request, there is no reason why he should not announce his intention to call for a dissolution, and use his announcement to influence waverers in an approaching party division or followers who are slack in attendance and support. In fact, the power of dissolution is a formidable disciplinary weapon in the hands of a Prime Minister."

The convention of collective cabinet responsibility, which is of the essence of parliamentary government, becomes, under the Irish Constitution, positive law by the following provision: "The Executive Council shall be collectively responsible for all matters concerning the Departments of State administered by members of the Executive Council" (Art. 54). The framers of the Irish Constitution, realizing that Ministers under that Constitution are actually chosen by Dáil Eireann, and that such Ministers are the servants and not the opponents of Dáil Eireann, of which they must be members, have wisely provided that the appointment of a member of Dáil Eireann to be a Minister shall not entail on him any obligation to resign his seat

or to submit himself for re-election (Art. 58). This article is of intense importance as an object-lesson of the attainment of the ideal of cabinet government—an Executive which is part and parcel of the Legislature in sympathy and in spirit and not estranged therefrom. The separation of the Executive and the Legislature, which is the essential feature of the American Constitution, is due to the experience of the framers of that Constitution, of the Ministers of the time of George III, who were servants of the Crown which had interests separate from the people and to the jealousy of the presence of such servants in the House of Commons—a jealousy which found its expression in an article of the Act of Settlement excluding all placemen or pensioners from the House of Commons—an article modified before the Act of Settlement came into operation by the Place Act which renders vacant the seats of members of the House of Commons who accept places or pensions under the Crown, in some cases permitting them to seek re-election and in others absolutely disqualifying them from membership of the House of Commons. So recently as 1919 the necessity incumbent on members of the British House of Commons accepting office under the Crown to submit themselves for re-election was partially removed by a Statute which provides that acceptance of office under the Crown by a member of the House of Commons within nine months from the date of the commencement of the Parliament then in existence does not affect his parliamentary status. The framers of the Irish Constitution have improved in this respect on the law of the British Constitution, and have further provided that Ministers should be

members of Dáil Eireann, whereas under the British Constitution members of the House of Peers are freely eligible for appointments as Ministers of the Crown. This exclusion of Ministers from the Irish Senate is in consonance with the trend of the development of Cabinet Government towards the bringing of Ministers into close and intimate association with the House of Parliament, whose servants they are more specially.

The design of the framers of the Irish Constitution that Dáil Eireann should be master of the Executive is clearly manifested. Their aim that Dáil Eireann itself should be the express image and the servant of the people of Ireland from whom, as in the words of the Constitution, "all powers of government and all authority, legislative, executive, and judicial, are derived" (Art. 2) is no less evident. The Irish Legislature, unlike the British Parliament, and unlike the old Irish Parliament, is not a sovereign body. There are distinct limitations to its powers. Thus, for instance, a governing clause provides that if conflict between the Constitution and the Treaty between Great Britain and Ireland of December 6, 1921, which the Irish Constitution Act has been passed to implement, should arise, the Treaty must prevail. The opinions of the Law Officers of the Crown, both of the late and the present British Government, are emphatic that a contingency of that character is unlikely to occur. It is moreover, provided that the judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution (Art. 65), and it is also provided—an improvement on the British Constitu-

tion, ardently advocated by Lord Brougham and shown by recent incidents to be expedient—that a judge shall not be eligible to sit in the Legislature and shall not hold any other office or position of emolument (Art. 69). But above all the establishment of the system of referendum, for whose operation the utmost facility is afforded both in ordinary legislation and in changes affecting the Constitution itself—in poignant contrast with the difficulty in the amending of the American Constitution—and a provision for popular initiative in legislation, make the electorate, not the Legislature, practically omnipotent, within the limits of the Constitution, in legislation.

Modern experience has pronounced almost decisively in favour of a bi-cameral as against a unicameral Legislature. By the Irish Constitution a bi-cameral Legislature is established, but the Senate or Upper House, which is itself an elected body under a system of extraordinary ingenuity for the securing of the due representation of every interest in the community, is not even in theory a body of equal power with Dáil Eireann. The functions of the Senate are in the main advisory and consultative. It is entitled to be informed, to advise, to warn. It can retard, by the application under special and well-defined conditions of the referendum, legislation with a view to the taking of the judgment of the people thereon. It has no absolute veto on proposed legislation.

✓ The constitution and powers of the Senate of the Irish Free State are worthy of careful study in relation to proposals for the reform of the House of Lords. In this article, necessarily confined within a small

compass, many matters have been left untouched, notably the questions of Ireland's Dominion status, of the powers of the Governor-General, and of the right of appeal under certain conditions from the judgments of the Irish Courts. Those subjects will, I am confident, raise no difficulties in the development of the Irish Constitution under conditions of good-will between Ireland and Great Britain.

The Constitution of the Irish Free State cannot fail to impress the student of its provisions as a monument of brilliant constructive statesmanship and of profound political genius. Charles James Fox, the intimate political friend of Grattan, speaking in the British House of Commons in March, 1797, in moving a motion in relation to Ireland, suggested by Grattan himself, described the Irish Constitution—Grattan's Constitution—notwithstanding its theoretical excellences, as "a mirror in which the abuses of the English Constitution are strongly reflected."\* The new Irish Constitution, in poignant contrast with its predecessor, contains provisions and capacities for development calculated to excite the envy and admiration of lovers of the British Constitution, even if they be so enthusiastic and devoted as to think it, in the quaint language of George III, "the most perfect of human formations."

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\* *Irish Debates*, xvii., p. 218. Mr. Fox's speech is reported in full in that volume of the *Irish Debates*.



# STUDIES IN THE CONSTITUTION OF THE IRISH FREE STATE

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## PART I.

THE Act of the Free State Constitution is as follows :

SAORSTAT EIREANN, NO. 1 OF 1922.

An Act to enact a Constitution for the Irish Free State (Saorstát Eireann) and for implementing the Treaty between Great Britain and Ireland signed at London on the 6th day of December, 1921.

Dáil Eireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of The Irish Free State

(otherwise called Saorstát Eireann) and in the exercise of undoubted right, decrees and enacts as follows :—

1. The Constitution set forth in the First Schedule hereto annexed shall be the Constitution of the Irish Free State (Saorstát Eireann).

2. The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as " the Scheduled Treaty ") which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State (Saorstát Eireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty.

3. This Act may be cited for all purposes as the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922.

The Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, consists of three sections only.



The first section enacts that the Constitution in the first schedule annexed to the Act shall be the Constitution of the Irish Free State. The second section enacts that the Constitution of the Irish Free State shall be construed with reference to Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the second schedule annexed to the Act. The third section declares the title of the Act—The Constitution of the Irish Free State (Saorstát Eireann) Act, 1922.

The Act itself pales in interest before the schedules. The preamble is, however, calculated to attract attention by the description given to itself by the body which has enacted this legislation. "Dáil Eireann sitting as a Constituent Assembly in this Provisional Parliament hereby proclaims the establishment of The Irish Free State (otherwise called Saorstát Eireann) and in the exercise of its undoubted right decrees and enacts as follows :—"

De Tocqueville described the Parliament of Great Britain as at once a "legislative" and a "constituent" assembly, meaning by the attribute "legislative" that the Parliament can make laws, and by the attribute "constituent" that it can make laws which shift the basis of the Constitution itself. The body which has enacted the Irish Constitution has designated itself a constituent assembly, inasmuch as it has been empowered by the people by whom it was elected to frame the



Irish Constitution. Dáil Eireann—a chamber of Deputies alone, a second chamber not then being in existence—has erected the Irish Legislature which consists of two Houses—an extraordinary instance of the erection by a unicameral Parliament of a bicameral Parliament. The moment the Irish Constitution came into operation the one-House Dáil elected at the General Election constituted with the Senate created by the Constitution Act a Parliament. The members of the Dáil by which the Constitution was established, on the taking of the Parliamentary oath prescribed by the Constitution, became entitled to sit and vote in the Dáil for a period not exceeding one year from the date (December 6, 1922) of the coming into operation of the Constitution. One of the transitory provisions of the Constitution (Article 81) produces this result. A one-House Parliament having framed the Irish Constitution becomes under the provisions of that Constitution an estate of a bicameral Parliament. That Article is as follows:—“After the date in which this Constitution comes into operation the House of the Parliament elected in pursuance of the Irish Free State (Agreement) Act, 1922 (being the Constituent Assembly for the Settlement of this Constitution) may for a period not exceeding one year from that date, but subject to compliance by the members thereof with the provisions of Article 17 of this Constitution (the taking of the oath)

exercise all the powers and authorities conferred on Dáil Eireann by this Constitution, and the first election for Dáil Eireann under Articles 26, 27 and 28 hereof, shall take place as soon as possible after the expiration of such period." This complete alteration by itself of the character of an elected representative assembly has a faint analogy in the history of representative institutions in the case of the Convention called together in England by William III in 1688, which converted itself of its own authority into a Parliament in 1689 (1 Wm. and M. *Revised Statutes* ii, 1), a precedent which was followed by the Scottish Convention of 1689. The English Convention Parliament was dissolved within a year. The existence of the House of the Parliament elected in pursuance of the Irish Free State (Agreement) Act, 1922, is limited to one year from the date of the coming into operation of the Constitution of the Irish Free State announced by proclamation of His Majesty.

The Irish Constitution is, as we have seen, set forth in the first schedule of the Constitution of the Irish Free State Act, 1922, an enactment whose full title is—a matter of significance—"An Act to enact a Constitution for the Irish Free State, and for implementing the Treaty between Great Britain and Ireland, signed at London, on the 6th day of December, 1921." Ireland has accordingly a written Constitution. The British Constitution, on

the other hand, consists of laws which are written laws embodied in the Statute Book—in other words, of Statutory Enactments, and of other most important laws which are unwritten laws that are not statutory enactments. Ireland has accordingly a Constitution unlike the British Constitution, but similar in character to the Constitutions of France, Belgium, and the United States, whose provisions are to be found in printed documents. But, as it has happened in the United States and in other countries with written Constitutions, so also in Ireland under the operation of the new written Constitution, there will undoubtedly arise as the calculated results of the provisions of that Constitution stringent conventional rules which, while unnoticed by any Court, will have in practice virtually the force of laws.

## PART II.

CONSTITUTION of the Irish Free State set forth in First Schedule of the Constitution of the Irish Free State Act, 1922 :—

### **Article 1.**

*The Irish Free State (otherwise hereinafter called or sometimes called Saorstát Éireann) is a co-equal member of the Community of Nations forming the British Commonwealth of Nations.*

The very first Article of the Irish Constitution in the absence ~~of~~ the conventions and understandings by which conventional, as distinguished from theoretical, constitutions are worked would be a mockery. It declares that the Irish Free State is a co-equal member of the Community of Nations forming the British Commonwealth of Nations. The members of that community, with the exception of Great Britain, are the Dominions, Colonies and Dependencies of the British Empire, and according to the law of the British Constitution these Colonies and Dependencies cannot make any laws inconsistent with any Act of the British

Parliament, nor with any part of an Act of Parliament intended by the British Parliament to apply to them. According to the strict letter of the Constitution, the Dominions and Colonies have no voice whatever in the direction of the trend of the foreign policy of the British Empire, and are absolutely bound in their domain of Government by the prerogative of the King acting on the advice of a Cabinet responsible only to the British House of Commons, and through that House of Commons to the people of Great Britain. When Great Britain makes war the Dominions and Colonies are at war ; when Great Britain makes peace the Dominions and Colonies are at peace. The principle of the law is that a colony is bound by Treaties made by Great Britain, and does not, unless under some special provision of an Act of the British Parliament, possess authority to make treaties with any foreign power. The conversion of the British Empire into " the Community of Nations forming the British Commonwealth of Nations " is a striking illustration of the powers of constitutional development by which momentous political changes have been effected without any legislative enactments whatever producing a startling divergence of law and custom, of theory and practice.

The contrast between the legal position of the Dominions and Colonies as mere dependencies of Great Britain to be administered not for their own

benefit but for the convenience of the Mother Country and their actual position in accordance with the conventions of the Constitution of the British Empire as free nations, co-equal members with Great Britain of the Community of Nations forming the British Commonwealth of Nations, is of the very highest import. The Dominions and Colonies of Great Britain have advanced from Dependencies to Nationhood. Mr. S. M. Bruce, the Prime Minister of Australia, has, on May 24, 1924, well described that position: "The British Nation nurtured in liberty governs by consent. No constitution binds us, no power enthrals us, no fear subdues us. We are self-governing partners of a Commonwealth of Nations." Ireland, however, who now becomes a member of the British Commonwealth of Nations by virtue of a solemn Treaty with Great Britain, has always been a Nation whose status, which is of the highest, cannot be further elevated by her entrance into the British Commonwealth of Nations. Too much importance cannot be attached to the fact that Ireland has always been a Nation. She had a Parliament of her own as old and as independent as the Parliament of Great Britain. Ireland did not by the Legislative Union lose her nationhood nor, theoretically, her Parliamentary independence; Ireland, who is a Nation *ab initio* obtains under the first Article of the Irish Constitution a formal declaration of a status



which was never abrogated—a status acquired by former dependencies of Great Britain by conventions and understandings. The status, however, of Ireland as a member of the Community of Nations forming the British Commonwealth of Nations is undefined by law just as the British Commonwealth of Nations is itself undefined, and has in strictness no legal existence, although well known and recognised in constitutional morality.

The conventional, as distinct from the legal, relations of the Dominions and Colonies towards each other, and towards Great Britain, have been explained and expounded by leading statesmen.

Mr. Lloyd George, in reply to the Independence Deputation from South Africa, which he received in Paris, on June 5, 1919, thus referred to Dominion status: "I would point," he said, "to the status which South Africa now occupies in the world. It is surely no mean one. The South African people control their own destiny in the fullest sense. In the greatest conference in history South Africa is represented by two statesmen of indubitably Dutch origin who have won for South Africa an extraordinary influence in the affairs of the world. It is futile to believe that South Africa can ever return to that isolation which was possible a century ago. The world has become too knit together. In the future League of Nations South Africa will have the same membership and status as, and far more

influence than, any of the other States which are outside the ranks of the Great Powers. Speaking to you not only as a British Prime Minister, but as the tried friend and well-wisher of the Dutch people, and as myself a member of one of the small Nations of the British Empire, I would advise your people with all the earnestness at my command not to endeavour to undo the past, but to look forward confidently to the great future which lies before an United South Africa, and to persevere on that road which Providence has marked out for our common line of progress."

The Irish Constitution is, accordingly, a definite legal document which is to be construed and explained according to the canons of legal interpretation. The task, however, of this construction and explanation is subject to an essential condition which distinguishes it from the task of eliciting the meaning of any ordinary enactment. The second section of the Constitution of the Irish Free State Act provides that if conflict between the Constitution which is embodied in the second schedule of the Act and the Treaty should arise, the Treaty must prevail. "The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland hereto annexed (hereinafter referred to as the Scheduled Treaty) which are hereby given the force of Law, and if any provision of the said Con-

stitution or amendment thereof, or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall to the extent only of such repugnancy be absolutely void and inoperative, and the Parliament and the Executive Council of the Free State shall respectively pass such further legislation, and do all such things as may be necessary to implement the said Treaty.”—(*Article 2, Constitution of the Irish Free State Act, 1922.*)

Mr. Bonar Law, moving as Prime Minister in the British House of Commons, on the 27th November, 1922, the second reading of the Irish Free State Constitution Bill, said that in his view the sole consideration before the House on that occasion was whether the Constitution complied with the Treaty. It was, Mr. Bonar Law submitted, very difficult for an ordinary lay man to come to a conclusion. He stated, however, that the Law Officers of the late Government (Sir E. E. Pollock and Sir L. Scott) and the Lord Chief Justice of England (Lord Hewart) who, at the request of Mr. Lloyd George, had undertaken to examine the terms of the Constitution with the Irish Free State representatives and the present Law Officers of the Crown (Sir J. M. Hogg and Sir T. Inskip), had given the most emphatic opinion that the Constitution was in conformity with the Treaty. “The legal opinion,” said Mr. Bonar Law, “of

so high an order, and representing such different views, ought to commend itself to the House as something which in itself was almost final." The question was asked in debate: What would the British Government do if the Irish Government failed to carry out their Treaty obligations? Professor Lawrence, one of the greatest exponents of the principles of international law, holds that when and under what conditions it is justifiable to disregard a treaty is a question of morality rather than of law (Lawrence's *Principles of International Law*, p. 288), while the Earl of Birkenhead says that it is difficult to avoid the conclusion that in the present state of opinion the validity of a treaty depends to an unfortunately large extent upon the power at the moment of the parties to it and the political importance of the interests which may induce one party to violate and the other to insist upon the maintenance of its powers. (Birkenhead's *International Law*, p. 149). The best reply as to the probable action of the British Government in the purely hypothetical case of the violation of the Treaty by the Irish Government was made by Sir J. McGarrell Hogg, the Attorney-General for England of the day, in debate in the House of Commons, on November 29, 1922. "The whole basis," he said, "on which the Government were bringing in the Bill was that the Free State legally

intended to carry out the Treaty, and he did not think it would help if the British Government proceeded to provide for what would happen if the Free State did not carry it out." In the British Constitution there are many instances in which a wise reticence is maintained as to the consequences of the violation of a law whose observance is regarded as a matter of good faith and honour. Thus, the statutes providing for the frequent summons and meeting of the British Parliament (of which one is still in force) do not say what is to happen if the Crown fails to carry them into effect. The Long Parliament devised machinery to meet such a case, but subsequent Parliaments appear to have thought it disloyal to provide for the contingency that the Crown might not fulfil the law.

Mr. Bonar Law, speaking in the House of Commons, on March 30, 1920, said :—

“ What is the essence of Dominion Home Rule ? The essence of it is that they have control over their whole destinies, of their fighting forces, and of the amounts which they will contribute to the general security of the Empire. All these things are vital to Home Rule. . . . There is not a man in the House who would not admit that the connection of the Dominions with the Empire depends upon themselves. If the self-governing Dominions Australia, Canada chose to-morrow to say, ‘ We will no longer make a part of the British Empire,’

we would not try to force them. Dominion Home Rule means the right to decide for themselves."

On December 14, 1921, Mr. Lloyd George, speaking in the House of Commons, as Prime Minister said :

"What does Dominion status mean? It is difficult and dangerous to give a definition. When I made a statement at the request of the Imperial Conference to the House as to what had passed at our gathering, I pointed out the anxiety of all the Dominion delegates not to have any rigid definitions. That is not the way of the British Constitution. We avoid the danger of rigidity, and the danger of limiting our Constitutions by too many formalities. Many of the Premiers in the course of that Conference delivered notable speeches explaining the importance of not defining too precisely what the relations of the Dominions were to ourselves. It is something that has never been defined by an Act of Parliament even in this country, and yet it works perfectly. All we can say is that whatever measure of freedom Dominion status gives to Canada, Australia, New Zealand, or South Africa that will be extended to Ireland, and there will be the guarantee contained in the mere fact that the status is the same, that whenever there is an attempt at encroaching on the rights of Ireland every Dominion will begin to feel that its own position is put into jeopardy. That is a guarantee

that is of infinite value to Ireland. In practice it means complete control over their own internal affairs without any interference from any other part of the Empire. They are rulers of their own hearth, of finance, administration, legislation, as far as their domestic affairs are concerned, and the representatives of the Sovereign will act on the advice of the Dominions' Ministers. That is in as far as domestic affairs are concerned. I come now to the question of external affairs. The position of the Dominions in reference to external affairs has been completely revolutionised in the course of the last four years. Since the war the Dominions have been given equal rights with Great Britain in the control of the foreign policy of the Empire. That was won by the aid they gave us in the Great War. I wonder what Lord Palmerston would have said if a Dominion representative had come over here in 1856 and said, 'I am coming along to the Conference of Vienna.'\* I think he would have dismissed him with polite disdain, and wondered where he came from. But the conditions were different. There was not a single platoon from the Dominions in the Crimean War. It would have been equally inconceivable that there should have been no representatives of the Dominions at Versailles or at Washington. There had been a complete change

\* Mr. Lloyd George mistakes Paris for Vienna.

in the conditions since 1856. What were they? A million men had gone from all the Dominions to help the Motherland in the hour of danger. Although they came to help the Empire in a policy which they had no share in passing, they felt that in future it was an unfair dilemma to impose on them. They said, 'You are putting us in this position—either we have to support you in a policy which we might or might not approve, or we have to desert the old country in a time of trouble. That is a dilemma in which you ought never to put us. Therefore, in future you must consult us before the event.' That was advantageous to both parties; we acceded to it gladly. The machinery is the machinery of the British Government—the Foreign Office, the Ambassadors. It was impossible that it could be otherwise unless you had a Council of Empire with representatives elected for the purpose. Apart from that you must act through an instrument. The instrument of the foreign policy of the Empire is the British Foreign Office. That has been accepted by all the Dominions as inevitable. But they claim a voice in determining the lines of our policy. At the last Imperial Conference they were there discussing our policy in Germany, in Egypt, in America, our policy all over the world, and we are now acting upon the mutual decisions arrived at with the common consent of the whole Empire. The sole control of Britain over foreign policy is now



vested in the Empire as a whole. That is a new fact, and I would point out what bearing it has upon the Irish controversy. The advantage to us is that joint control means joint responsibility. . . . Had Pitt the present condition of things to deal with, had he found that the question of treaties, alliances, peace, war, were left as they are now to a great Council of free people, each of them self-governing, coming together with the Motherland to discuss their affairs and decide upon their policy, what he would have done then would have been to invite Ireland to come to the Council Chamber to merge her interests and her ideals with the common ideals of the whole of those free people throughout the Empire. Ireland will share the rights of the Empire and the responsibilities of the Empire. She will take her share with other Free States in discussing the policy of the Empire."

Mr. Bonar Law's definition of Dominion status in March, 1920, has been stated. On December 6, 1922, the very day of the establishment of the Irish Free State Constitution, Mr. Bonar Law, as Prime Minister, at the annual meeting of the Empire Parliamentary Association, thus spoke of the relations of the Dominions to the Mother Country and each other on questions of foreign policy :

" If the relationship which we all desired, and which was essential, was to continue it must depend, first of all, upon the people of the different common-

wealths, but more so on the Governments of the Dominions who were elected by the people, and who had the opportunity of coming into touch with the whole Empire. He did not think there ever was a time when this kind of work was more important than it was now. During the war, when he had the opportunity of seeing our Colonial fellow-soldiers, he had the feeling, which events had justified, that the relationship after the war could never be quite the same as before. Undoubtedly, despite all our own efforts, but for the help that we got from the Dominions, the war could not have been won. That, of course, made a great difference in general relationship. Those of them who had grown up children knew that the most difficult time in the relations between father and son was when the son was beginning to reach the stage of manhood, and when the father must realize that he was no longer in a position to give orders. That was just the position in regard to the Dominions. They had attained their manhood and were entitled—and what was more, they were conscious that they were entitled—to a larger share in the direction of the whole policy of the Empire than ever before. There was no machinery for securing that, and it was for that reason it must depend upon good-will all round ; and he was sure

that no organisation that he knew of was more likely to help in maintaining that feeling of solidarity than that association.”

When the Premier of Great Britain was speaking to the Empire Parliamentary Association of the relations to each other of the British Commonwealth of Nations, Mr. Cosgrave, the President of the Executive Council of the Irish Free State, explained and expounded the status of Ireland as a co-equal member of that Commonwealth :

“ The present position of the Free Nations which constitute the British Commonwealth is something that every Irishman should examine, know, and dwell upon. I will not give you my own statement of what that position now means. I will tell you what the most British of British statesmen have admitted that it means. I am not even asking you to take what a great Dominion statesman like General Smuts said about it. The words that I am about to quote are the words of Lord Milner, who, in July, 1919, said : ‘ The only possibility of a continuance of the British Empire is on a basis of absolute out and out equal partnership between the United Kingdom and the Dominions.’ In March, 1920, he said : ‘ The United Kingdom and the Dominions are partner nations, not yet, indeed, of equal power, but for good and all of equal status.’

“ Mr. Balfour wrote in *The Times* so far back as February, 1911—and I would remind you that there has been great development since that time in Dominion *status*. He wrote thus : ‘ Legally, the British Parliament has supremacy over the Parliaments of Canada and Australia, of the Cape and of South Africa, but in reality these Parliaments are absolutely independent.’ So that General Smuts did not merely make a claim, but he asserted a real position when he said in September, 1919 : ‘ We have received the position of absolute equality and freedom, not only among other States of the Empire, but among other nations of the world.’ I take these passages to-day as summing up for you in vivid fashion the great accomplishment which this day signalises.”

A striking object lesson of the contrast between the spirit and the letter of the British Constitution, or rather of the Constitution of the British Commonwealth of Nations of which Ireland has become a member, and the conventions of that constitution, is presented by the manifesto which was issued on 16th September, 1922, by Mr. Lloyd George, as Prime Minister, and drawn up by Mr. Winston Churchill, as Secretary of State for the Colonies.

The manifesto states, “ His Majesty’s Government has communicated with the Dominions, placing them in possession of the facts and inviting them

to be represented by contingents in the defence of the interests of the British Empire.' In this statement is embodied the acknowledgment of the right of participation by the Dominions in the direction of the foreign policy of the community of free nations known as the Commonwealth of the British Empire, and of their admission into a full knowledge of the facts of the international relations of Great Britain and foreign nations, which will enable the Dominions to give counsel and advice and aid in time of need, with not merely competent but unreserved and unrestricted information of the facts of the situation in all their bearings. That incident has demonstrated the decision of Great Britain and the Dominions not to enter on the formulation and the embodiment in a written document of the Constitution of the British Empire, but rather to allow that Constitution, as in the case of the British Constitution itself, to grow as a living organism and to be developed, almost in obedience to a natural law. Of the Constitution of the British Empire the words of Professor Freeman, in reference to the English Constitution, are likely to be applicable. "Our English Constitution was never made in the sense in which the Constitutions of many other countries have been made. There never was any moment when Englishmen drew out the political system in the shape of a formal document, whether as the

carrying out of any abstract theories or as the imitation of the past or present system of any other nation." The scheme of direct constitutional reconstruction of the British Empire which, during the Great War and for some time after its termination was entertained, has been easily abandoned. But the words of Mr. Lloyd George, Prime Minister in 1917, "things can never be the same after the War as before it," have been abundantly verified, and are proved by the statement in the Cabinet manifesto that the Dominions have been apprised of the facts of a crisis in foreign affairs, with a view to their co-operation and assistance in the direction of the foreign policy of the Empire. The relation of the Dominions to the mother country on questions of foreign policy, and the contrast between the strict letter of the law of the Constitution of the British Empire and its spirit and practice, may be illustrated by questions addressed in 1921 in the House of Commons to Mr. Winston Churchill in relation to the 49th Article of the Constitution of the Irish Free State and his replies thereto. The 49th Article of that Constitution provides that "Save in case of actual invasion the Irish Free State shall not be committed to active participation in any war without the assent of the Oireachtas (Legislature)." Mr. Churchill informed Colonel Archer Shee that he was aware that under Article 49 of the

Constitution of the Irish Free State, the consent of the Free State Parliament was necessary before active participation in a war. The Article must be read in conjunction with the words of the Constitution which provided that the Constitution should be construed with reference to the Treaty, and that if any provision of the Constitution were in any respect repugnant to any provisions of the Treaty, it should, to the extent of such repugnancy be absolutely void and inoperative. Colonel Archer Shee then asked : " Is it not a fact that Article 49 is entirely repugnant to the Treaty, in view of the fact that Article 7 (of the Treaty) says we shall be afforded harbour facilities for defence which, *ipso facto*, brings Ireland into any war? Suppose the Irish Parliament refuse to allow their country to go to war, does that mean that Article 7 is to be torn up?" Mr. Winston Churchill's reply to that question is an exposition, albeit unconscious, of the contrast between the letter and the practice of the Constitution of the British Empire. " When," he said, " the King declares war, all subjects of the British Empire and all the Dominions of the Crown are, from that moment, at war. As to the degree of active participation in the war, that is for the self-governing dominions to decide. They have always been very jealous as to their powers."

The co-equal membership of the Irish Free State in the British Commonwealth of Nations will, having regard to the fact that Ireland was a free Nation, in the words of Mr. Lloyd George, on the 14th December, 1921, before the oldest of the Dominions was discovered, confirm and strengthen most powerfully the status of every member of that community as a free and independent Nation—Ireland's membership will, moreover, be a most powerful factor in the complete transformation in the spirit as contrasted with the letter of the Constitution of the British Empire. That transformation will be effected, without any exact or legal definition of constitutional relations, by conventions, understandings, and customs "grounded," in the words of Mr. Bonar Law, "upon good-will all round."

The Constitution of the Irish Free State is a written Constitution, and subject accordingly to the limitations incident to a written Constitution, but the Constitution of the British Commonwealth of Nations was never a written Constitution in the accepted definition of that term, and has become virtually a Conventional Constitution.



**Article 2.**

*All powers of government and all authority, legislative, executive, and judicial, are derived from the people and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organisations established by or under, and in accord with, this Constitution.*

The declaration in the second Article of the Constitution, that all powers of government and all authority, legislative, executive, and judicial, are derived from the people, seems to draw the distinction between the unfettered power of the Irish people to manage their own affairs in the Irish Free State and the power of the Irish Free State as a co-equal member of the community of Nations forming the British Commonwealth of Nations, in which the Irish Free State as a member shall only have a voice with the other members in the determination of the policy of the Empire. The membership of the Irish Free State, under the Constitution of the British Commonwealth of Nations, is in all respects of an essentially privileged character. The 49th Article of the Constitution provides, as has been mentioned, that, save in case of actual invasion, the Irish Free State shall not be committed to actual participation in any war without the assent of the Legislature. This privilege accorded to

Ireland is a recognition albeit unconscious of her position as a Nation *ab initio* in entrance into co-equal membership of the British Commonwealth of Nations.

The organisations established by order of, or in accord with, the Irish Constitution, by which all powers of Government and all authority, legislative, executive and judicial, in Ireland are exercisable are : (1) A Legislature in which the sole and exclusive powers of making laws for the peace, order and government of Ireland is vested (Article 12) ; (2) The Executive Authority of the Irish Free State vested in the King and exercisable in accordance with the law, practice, and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada by the Representative of the Crown (Article 51) ; and (3) The Judicial power exercisable in public courts established by the legislature by judges appointed under the provisions of the Constitution (Article 65).

Article 2 of the Irish Free State Constitution which declares that " all powers of government and all authority, legislative, executive, and judicial, are derived from the Irish people," is an enunciation of sovereignty which without qualification might be summarised in the historic toast, " The sovereign majesty of the people," whose proposal by Charles James Fox was immediately followed by his removal from the Privy Council. The Article, however,

contains this modification in relation to such sovereign powers: "The same shall be exercised by the Irish Free State through the organisations established by or under ~~or~~ in accord with this Constitution." The points on which the signatures of the representatives of Great Britain who were signatories to the Irish Treaty insisted so strenuously have been amply met. There is no claim to the independent control of foreign affairs—on the contrary, it is provided in Article 1 that the Irish Free State is a co-equal member of the Community of Nations forming the British Commonwealth of Nations; the appointment of judges is to be made in the King's name, the position of the Governor-General as representative of the King is fully safeguarded, while the wording of the Parliamentary oath as embodied in the Treaty has been maintained. The statement of Mr. Churchill on behalf of the British Government in the House of Commons on 15th November, 1921, that in the opinion of that Government the Constitution is in conformity with the Treaty, is calculated to allay any apprehension that in its working it will be found to be antagonistic or injurious to the interests of Great Britain or of the Empire at large. Mr. Churchill's statement was, moreover, of high constitutional import. The declaration of the Government, of which he was the mouthpiece, as in the case of the Treaty so also in the case of the

Irish Constitution, entailed on those supporting that Government the obligation, when the Constitution was submitted to Parliament for its approval, to accept the instrument to which the Government itself must be regarded as a high contracting party in its entirety.

### Article 3.

*Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) at the time of the coming into operation of this Constitution, who was born in Ireland or either of whose parents was born in Ireland, or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years, is a citizen of the Irish Free State (Saorstát Eireann) and shall within the limits of the jurisdiction of the Irish Free State (Saorstát Eireann) enjoy the privileges and be subject to the obligations of such citizenship: Provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State (Saorstát Eireann) shall be determined by law.*

The word "domiciled," which is in this Article the governing term, makes it of interest to consider

what constitutes domicile. "If," says Lord Chancellor Cranworth, "the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile. On the other hand, mere length of residence will not of itself constitute domicile. There must be not only the physical fact of residence but the mental fact of purpose or intention to reside (*animus morandi*). International law recognises two kinds of domicile: (1) domicile of origin, such as children acquire by an absolute rule or fiction of law at the time of birth by reason of the domicile at that time of the person on whom they are dependent—usually the father or mother; (2) domicile of choice, such as every dependent person may acquire through the proper continuation of the fact of residence with the intention of a permanent or indefinite prolongation of it. Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies in the party who asserts the change. As Lord Westbury has expressed it, domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time." (See

Harris Taylor's *Treatise on International Public Law*, pp. 249-250). Sir J. McGarrell Hogg, K.C., speaking as Attorney-General for England, in the House of Commons, on November 29, 1922, said that "he would like to state quite definitely that, in his judgment, and he thought in the judgment of any responsible lawyer, the fact that any person elected to accept Irish citizenship did not in any way injure or affect his status as a British subject. In regard to the question whether or not the British Government would legislate to ensure that Irishmen resident in England should only get the franchise in England on the same terms as Englishmen resident in Ireland, his answer was that he did not suppose for one moment that the Government would assent to any such legislation being introduced. Their view was that all persons from wherever they came were entitled to the franchise on the same conditions one with another, and the conditions on which their particular country of origin might give Englishmen the franchise never entered into the question at all."

#### **Article 4.**

*The National language of the Irish Free State (Saorstát Eireann) is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this Article shall*

*prevent special provisions being made by the Parliament of the Irish Free State (otherwise called and herein generally referred to as the "Oireachtas") for districts or areas in which only one language is in general use.*

The journals, entries and proceedings of the Irish Parliament are made and recorded in the Irish and the English languages. Under Article 42 of the Constitution it is provided that :—

As soon as may be after any law has received the King's assent, the clerk, or such officer as Dáil Eireann may appoint for the purpose, shall cause two fair copies of such law to be made, one being in the Irish language and the other in the English language (one of which copies shall be signed by the Representative of the Crown to be enrolled for record in the office of such officer of the Supreme Court as Dáil Eireann may determine), and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies so deposited, that signed by the Representative of the Crown shall prevail.

In the British Parliament members must address the respective Houses in English. In the Parliament of the South African Union the journals, entries and proceedings are made and recorded in the English language, but debates and discussions may be conducted either in English or in Dutch, but in no other language. On the 19th February, 1901, it was ruled that a member must address the British House of Commons in English.

To this day, however, the record of the assent of one House of the British Parliament to Bills passed, or amendments made by the other, is by indorsement of the Bill in old Norman French. The Royal assent to Bills is, when given by the King in person or by commission signified by the Clerk of the Parliament, in Norman French, and is so entered in the Lords' Journal.

#### **Article 5.**

*No title of honour in respect of any services rendered in or in relation to the Irish Free State (Saorstát Eireann) may be conferred on any citizen of the Irish Free State (Saorstát Eireann) except with the approval or upon the advice of the Executive Council of the State.*

In the Honours Commission Report, which was issued on December 30, 1922, in respect of recommendations concerning persons who are, or who have been lately, resident in overseas Dominions, it was in each case considered desirable that the Prime Ministers of the Dominions should be consulted. The recommendation of the Irish Government is, however, under the Constitution an essential condition precedent in the cases of citizens of the Irish Free State recommended in respect of



services rendered in or in relation to the Irish Free State. Titles of Honour may be conferred on citizens of the Irish Free State for services other than services rendered in or in relation to the Irish Free State, the idea probably being that citizenship of the Irish Free State should not place any subject of the Commonwealth of Nations by reason thereof under disability or incapacity. The framers of the American Constitution endeavoured to eliminate from that Constitution the conferring of honours for political services which had been a pernicious influence in the working of the British Constitution of their own time. The very first article of the Constitution of the United States provides : " No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall without the consent of Congress accept of any title of any kind whatever from any Kings, Princes, or Foreign Power." Mr. Lecky feels himself constrained to write in reference to the bestowal of honours in Ireland : " The peerage, which was the natural representative of the landed classes, was habitually degraded, and the majority of Irish titles are historically connected with memories not of honour but of shame." (*History of England in the Eighteenth Century*, V., p. 518.) Speaking in the English House of Commons on March 23, 1797, Mr. Fox said that it was the system of the

Irish Government "by the sale of peerages to have a purse to purchase the representation, or rather the misrepresentations of the Irish people."

In the Viceroyalty of the Marquis Cornwallis, the Lord Lieutenant of the Union, in the interval between his appointment in July, 1798, and the carrying of the Union, no fewer than twenty-eight Irish peerages were created, six Irish peers obtained English peerages on account of Irish services, and twenty Irish peers obtained a higher rank in the Peerage. (Lecky's *History of England in the Eighteenth Century*, VIII., p. 398.) These peerages were simple, palpable, open bribes intended for no other purpose than to secure a majority in the House of Commons.

#### **Article 6.**

*The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. Upon complaint made by or on behalf of any person that he is being unlawfully detained, the High Court and any and every judge thereof shall forthwith enquire into the same, and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such Court or judge without delay, and to certify in writing as*

*to the cause of the detention, and such Court or judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with the law :*

*Provided, however, that nothing in this Article contained shall be invoked to prohibit control or interfere with any act of the military forces of the Irish Free State (Saorstát Eireann) during the existence of a state of war or armed rebellion.*

Many of the provisions of the Irish Constitution in which this Article is included may be regarded as constituting in themselves enunciations of the supremacy of the law, or, in other words, of the security given under that Constitution to the rights of individuals. These provisions have been and are, some in large measure, others absolutely, secured by statute or by the common usage of Ireland. Why, then, are these provisions incorporated in the Irish Constitution?

The reason may perhaps be discovered in the fact that the Irish Constitution differs fundamentally from the political theory of England by placing (Article 50) amendments of that Constitution, whose provisions can only be altered after a Referendum, upon a different footing from ordinary laws. The great and enduring principles of the British Constitution and of national liberty are thus secured and strengthened. To a similar reason may be ascribed

the incorporation in the Constitution of the United States of the same principles. Mr. J. M. Beck, in his concluding lecture on the American Constitution, had thus explained and justified the wisdom in the adoption of this policy by the framers of that Constitution. "In only three States," he said, "was the Constitution ratified without controversy. In the remaining ten the struggle was long and arduous, and nearly a year passed before the requisite nine States gave their assent. Two of the new States refused to become parts of the new nation even after it began, and three years passed before the thirteen States were reunited under the Constitution. It could not have been ratified had there not been an assurance that there would be immediate amendments to provide a Bill of Rights to safeguard the individual. Thus came into existence the first ten amendments to the Constitution with their perpetual guaranty of the fundamental rights of religion, freedom of speech and of the press, the right of assemblage, the immunity from unreasonable searches and seizures, the right of trial by jury and others." The incorporation in the Irish Constitution of the fundamental principles of liberty, which are in some cases of the very essence of common law rights, and in other cases secured by statutes, operative in Ireland under the old Constitution, subject, of course, to repeal or modification, may, in some degree, be due to the legal and constitutional

history of Ireland. The beneficial Acts which are the essential preservatives of the British Constitution and the fundamental laws of Great Britain, were in some instances, not extended to Ireland for centuries after their enactment in Great Britain; in other cases they were extended, but after long intervals and in a mutilated form, while other statutes of equal importance were never extended to Ireland at all. To give an illustration: Ireland never had a Bill of Rights. In 1692, in the first Irish Parliament that was held after the Revolution, the heads of a Bill containing the chief provisions of the Bill of Rights were sent to England. They were, however, never returned to Ireland. The heads of a Bill extending the provisions of the *Habeas Corpus* Act to Ireland had again and again been transmitted to England, but were never returned. Indeed, the Irish Privy Council were told to transmit the Bill no more. It was not till 1782 that an Irish *Habeas Corpus* Act (21 & 22 Geo. III, Ireland c. 11) was passed.

The declarations of rights, which as we know have been secured by common law or statute, with which the first part of the Irish Constitution abounds may be due, as has been mentioned, to a desire to secure that no laws invading those rights can be passed without a modification of the Constitution made in the special way in which alone the Constitution can be legally changed or amended. The

means for giving legal security to the right of personal freedom declared by this Article which are themselves incorporated in the Article, and as such only subject to modification by an alteration of the Constitution itself, are pronounced indications of the supremacy of law as contrasted with the Executive power, which is so marked a feature of the Irish Constitution, although a written Constitution, just as it is of the English Constitution which is an unwritten Constitution. The term "guaranteed" to be found in another Article (Article 9) of the Irish Constitution bears out the intention of the framers of that Constitution to secure by its provisions the principles of personal liberty to their fullest extent. Article 9 declares the "right of free expression of opinion" and other rights "to be guaranteed" for purposes not opposed to public morality. "We," writes Professor Dicey, "can hardly say that one right is more guaranteed than another (under the British Constitution). Freedom from ordinary arrest, the right to express our opinion on all matters, subject to the liability to pay compensation for libellous or to suffer punishment for seditious or blasphemous statements, and the right to enjoy our own property, seem to Englishmen to rest on the same basis—namely, on the law of the land. To say that the Constitution 'guaranteed' one class of rights more than the other would be to an Englishman an unnatural or a sense-

less form of speech." The British Parliament works with the same procedure whether it is removing an obsolete form or making the most radical changes in the Constitution, whereas changes in the Irish Constitution can only be effected under very special circumstances and conditions.

The right to personal liberty, declared by the Irish Constitution to be inviolable, and the method by which that personal liberty is secured have thus been explained and expounded by Professor Dicey. "The right to personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion that does not admit of legal justification. That any person should suffer physical restraint in England is *primâ facie* illegal, and can be justified, speaking in very general terms, on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Court to stand his trial, or because he had been duly convicted of some offence and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned, except in due course of law, *i.e.* (speaking again in very general terms indeed) under some legal warrant or authority; and what is of far more consequence, it is secured by the provision of adequate legal means

for the enforcement of this principle. These methods are twofold—by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of a writ of *habeas corpus*.” (Dicey’s *Law of the Constitution*, pp. 222-223.) The phrase in the Article, “No person shall be deprived of his liberty except in accordance with law,” is an enunciation emphasized by the incorporation in the Constitution itself of the remedy for such deprivation of liberty—the invocation of the aid of the Judiciary to maintain the supremacy of the rule of law. The rule or supremacy of law includes as a characteristic of the British Constitution, according to Professor Dicey, under one expression at least three distinct though kindred conceptions :—(1) That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal way before the ordinary courts of the land. In this sense the rule of law is contrasted with any system of Government based on the exercise by persons in authority of wide arbitrary or discretionary powers of restraint ; (2) that no man is above the law, but that every man whatever be his rank or condition is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals—every official is under the same responsibility for any act done without legal justification as any other citizen ; (3) that the term *rule of law* may in England be used



as a formula for expressing the fact that the laws of the Constitution, the rules which in foreign countries internally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts, that in short the principles of private law have been by the action of courts and Parliament so extended as to determine the position of the Crown and its subjects ; thus the Constitution is the result of the ordinary law of the land. (Dicey's *Law of the Constitution*. Lecture V—Rule of Law and its Nature, pp. 169-218.) Professor Dicey's third contention, that in England the law of the Constitution is not the source but the consequence of the rights of individuals as defined and enforced by the courts, is adumbrated if not anticipated by Professor Freeman writing in 1865, twenty years before Professor Dicey. " Our English Constitution," he says, " was never made in the sense in which the Constitutions of many other countries have been made. There never was any moment when Englishmen drew out their political system in the shape of a formal document, whether as the carrying out of any abstract political theories, or as the imitation of the past or present system of any other nation. There are, indeed, certain great political documents each of which forms a landmark in our political history. There is the Great Charter, the Petition of Right, the Bill of Rights [Professor Dicey

designates the Petition of Right and the Bill of Rights Parliamentary Declarations of the law]. But not one of them gave itself out as the enactment of anything new. All claimed to set forth with new strength it might be, and with new clearness, those rights of Englishmen which were already old. In all our great political struggles the voice of Englishmen has never called for the assertion of new principles for the enactment of new laws; the cry has always been for the better observances of the laws which were already in force, for the redress of grievances which had arisen from their corruption and neglect." (Freeman's *Growth of the English Constitution*, pp. 56-57.) In Ireland it may be affirmed without fear of contradiction that the right to individual liberty must be regarded as secured by the decisions of the Courts extended and confirmed by *Habeas Corpus* as in Great Britain; that right is moreover not created, but strengthened by the provisions of the Irish Constitution, of which it is part and parcel, whereby inroads on that right can only be effected by an alteration of the Constitution by means of a designedly difficult procedure subject to strictly enforced conditions and limitations.

This Article of the Irish Constitution not only declares the liberty of the person to be inviolable, and that no person shall be deprived of his liberty, except in accordance with law, but as in the American Constitution incorporates as a fundamental

principle of the Constitution the remedy for the violation of the liberty of the person. Although the remedy so provided has been amply secured by statute it is *ex majore cunctelâ* made part and parcel of the Constitution itself, to establish it more firmly and to render any attempts to weaken its efficiency a matter of difficulty, if not quite impossible of accomplishment without the consent of the people signified under the provisions of the referendum, to which all alterations of the Constitution will eventually be essential conditions precedent. Professor Dicey has well said, "There is no difficulty, and there is often very little gain in declaring the existence of a right to personal freedom, the true difficulty is to secure its enforcement. The *Habeas Corpus* Acts have achieved this end, and have therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights. One may even venture to say that these Acts are of more importance not only than the general proclamations of the rights of man, which have often been put forward in foreign countries, but even than such very lawyer-like documents as the Petition of Right or the Bill of Rights, though these celebrated enactments show almost equally with the *Habeas Corpus* Act that the law of the English Constitution is at bottom judge-made law." (*Law of the Constitution*, pp. 236-237.) The *Habeas Corpus* Acts whose principal provisions are incorporated in

this section are essentially procedure Acts, and simply aim at improving the legal mechanism by means of which the acknowledged right to personal freedom may be enforced. Mr. Hallam observes in reference to the celebrated English *Habeas Corpus* Act, 1679, that it is a common mistake to suppose that this statute enlarged to a great degree our liberties and forms a sort of epoch in their history. But though a very beneficent enactment and eminently remedial in many cases of arbitrary imprisonment it introduced no new principle nor conferred any right upon the subjects. "It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided in Magna Charter (if indeed it was not much more ancient) that the Statute of Charles II was enacted, but to cut off the abuses by which the Government's lust of power, and the servile subtlety of Crown lawyers, had impaired so fundamental a privilege." (Hallam's *Constitutional History of England*, III., pp. 10-15.) In Ireland before the establishment of Legislative Independence in 1782 the Heads of a Bill extending the provisions of the *Habeas Corpus* Act to Ireland had again and again been transmitted to England. Such Bills were, in the words of Lord Harcourt when Lord Lieutenant in a letter written to Lord Rochfort, dated March 4th, 1774, held "irreconcilable with the idea of a dependency. It was regarded as a solecism in politics to make the Con-

stitution of a colony the same as that of the mother country." "The Catholics must be admitted to the protection of the *Habeas Corpus* or excluded." The Viceroy thus proceeds to state what seemed to him the dangers either of admitting or excluding them, throwing on the English Council the onus of arriving at a decision. (See Froude's *English in Ireland*, II., pp. 178-179.) It was, however, habitually maintained as an argument for not extending the *Habeas Corpus* Act to Ireland that from the usage of the country, from the common law of the realm, and from the conduct of the judges the *Habeas Corpus* Act was in operation in Ireland, though not under the authority of statute. The position thus assumed, however insufficient the grounds for the assumption may be, is strong evidence that the *Habeas Corpus* Act is an Act of Procedure. "The right," says Professor Dicey, "to the Writ of *Habeas Corpus* existed at common law long before the passing in 1679 of the celebrated *Habeas Corpus* Act (31 Char. II, c. 2), and you may wonder how it has happened that this and the subsequent Act, 56 Geo. III, c. 100 (to remedy illegal detention on alleged grounds not of a criminal character), are treated, and for practical purposes rightly treated, as the basis on which rests an Englishman's security for the enjoyment of personal freedom. The explanation is that prior to 1679 the right to the writ

was often under various pleas and excuses made of no effect. The aim of the *Habeas Corpus* Acts has been to meet all the devices by which the effect of the writ can be evaded either on the part of the judges who ought to issue the same and, if necessary, discharge the prisoners, or on the part of the gaoler or other person who has the prisoner in custody. The earlier Act of Charles II applies to persons imprisoned on a charge of crime, the later Act of George III applies to persons deprived of their liberty otherwise than on a criminal accusation." (*Law of the Constitution*, pp. 231-232). The entrusting to the judges of the means of enforcing and securing the liberty of the citizen of the Irish Free State determines the whole relation of the Judicial to Executive Authority. "The authority," writes Professor Dicey, "to enforce obedience to the writ is nothing less than the power to release from imprisonment any person who, in the opinion of the court, is unlawfully deprived of his liberty, and hence an effort to put an end to or to prevent any punishment which the Crown or its servants may attempt to inflict in opposition to the rules of law as interpreted by the judges." The judges, therefore, are in truth, though not in name, invested with the means of hampering and supervising the whole administrative action of the Government, and of at once putting a veto upon any proceeding not authorised by the letter of the law. (Dicey's *Law of*

*the Constitution*, p. 207). When the English *Habeas Corpus* Act was passed the King had an absolute power in the appointment and dismissal of judges. The Judicial Bench as to the tenure of office was absolutely at his mercy. In the Stuart period no fewer than twelve English judges were dismissed from the Bench. The penalties of extraordinary severity to which judges under the provisions of the English *Habeas Corpus* Act are liable for misconduct in failure to issue the writ under the circumstances in which its issue is imperative according to the provisions of the Act are relics of the time when the judges were the dependent creatures of the Executive. The political conflicts of the seventeenth century in England often raged round the position of the judges. Upon the degree of authority and independence to be conceded to the Bench depended the value of the working of English governing institutions. The Act of Settlement, which had passed in 1701 but did not come into operation till the death of Queen Anne many years afterwards, constituted the truest safeguard of the personal liberty of the subject and of the upright administration of the *Habeas Corpus* Act, when it provided that judges should hold their offices during good behaviour, but might be dismissed upon address of both Houses of Parliament. "William III," writes Mr. Hallam, "gave an unfortunate instance of his very injudicious tenacity

of bad prerogatives in refusing his assent in 1692 to a Bill that had passed both Houses for establishing the independence of the judges by law." The independence of the Irish judges was not secured by a provision similar to that contained in the Act of Settlement in England till upwards of eighty years after the passing of that measure. The heads of a Judges' Tenure Bill had again and again been forwarded, but like the heads of the *Habeas Corpus* Bill had not been returned by the Privy Council. In 1776 Lord Harcourt, in transmitting the heads of a Judges' Tenure Bill thus wrote to Lord Weymouth : " The state of the country duly considered, I am persuaded it would be undesirable to make the commissions of judges to continue during good behaviour, so many inconveniences would result from such a Bill that I think it will not be deemed proper to return it to Ireland." The Harcourt correspondence in the State Paper Office was preserved in copies made and annotated by Sir John (Lord) Blacquiere, who was Chief Secretary in Lord Harcourt's Viceroyalty. To this dispatch of Lord Harcourt, Blacquiere appends this remark : " I was in the country when this extraordinary letter was written." Again in 1780, on rejection of the heads of a Judges' Tenure Bill by the English Privy Council, Lord Buckinghamshire, the Lord Lieutenant of the day, thus writes : " As the having the commissions of the Irish



judges the same as in England has been a favourite wish in this country it was never, as I understand, thought expedient to oppose the heads in the House of Commons, the reasons upon which these heads have been disapproved by His Majesty's British servants not being of a nature to be agitated here even in quiet times." (Froude's *English in Ireland*, II., p. 269.)

We have seen the effect of the writ of *habeas corpus* on the authority of the judges in contests between the Executive and the individual, and the persistence with which measures for the purpose of making the judges independent of the Government in the tenure of their office was opposed as calculated to weaken the power of the Executive. It is remarkable that a *Habeas Corpus* Act and a Judges' Tenure Bill, which is the complement of a *Habeas Corpus* Act, were passed in the same session by the Irish Parliament, while Poynings' Law was still unaltered, but was clearly doomed, on the eve of the alterations and modifications which were essential to the establishment of Irish Legislative Independence. The heads of a *Habeas Corpus* Bill and of a Judges Bill were both returned unmutated from the English Privy Council, which had clearly been directed as an act of policy not to exercise a power which would be virtually ineffective over Bills which would inevitably be passed by the Irish Parliament on the abolition of the power of

the English Privy Council to interfere with Irish legislation which was then imminent. In 1782, before the establishment in that year of Irish Legislative Independence, two measures which the power of veto that Poynings' Act conferred upon the English Privy Council had previously obstructed, were passed. The first (21 & 22 Geo. III, c. 2) was an Irish *Habeas Corpus* Act, entitled "An Act for Better Securing the Liberty of the Subject," which differed from the English in not extending to the prevention of imprisonment beyond the seas. In this Act was contained a power for the Chief Governor and Privy Council of Ireland to suspend the Act by proclamation under the Great Seal during such time as there should be an actual invasion or rebellion in Ireland or Great Britain. The power thus conferred bears a very striking resemblance to the proviso contained in the last paragraph of Article 6 of the Irish Free State Constitution—namely, "that nothing in this Article contained shall be invoked to prohibit control or interfere with any act of the military forces of the Irish Free State during the existence of a state of war or armed rebellion." The second measure passed notwithstanding Poynings' Law (21 & 22 Geo. III, c. 50) secured the independence of the judges by providing that their commissions should continue and be in force during their good behaviour. It enabled their removal only

upon an address of both Houses of Parliament. The bedrock of the Constitution of the Free State is the supremacy of law in the interpretation placed on that term, in my judgment correctly, by Professor Dicey.

The Second Schedule of the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, in the First Schedule of which the Constitution of the Irish Free State is embodied, provides that this Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland, set forth in the Second Schedule of the Free State Act, which are thereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any provisions of the Scheduled Treaty it shall only to the extent of such repugnancy be absolutely void and inoperative. The courts of law will thus become inevitably the interpreters of the Constitution. It may, however, be assumed that the judges of the Irish Free State, like the judges of the United States, while they will control the action of the Constitution will perform purely judicial functions. It is natural to say that the Supreme Court pronounces Acts of Congress invalid, but in fact this is not so. The Court never pronounces any opinion whatever upon an Act of Congress. What the Court does do is simply to determine

that in a given case A. is or is not entitled to recover judgment against X. ; but in determining that case the court may direct that an Act of Congress is not to be taken into account, since it is an Act beyond the Constitutional powers of Congress—just as the Irish Courts will determine in a particular case, not that an Act of the Irish Legislature is invalid but that in the case before it an Act of the Irish Legislature is not to be taken into account, since it is an Act beyond the constitutional powers of the Irish Legislature. (See Dicey's *Law of the Constitution*, pp. 88-91, see also *Ibid*, p. 151.) “ If any one,” writes Professor Dicey, “ thinks this is a distinction without a difference he shows great ignorance of politics, and does not understand how much the authority of a court is increased by confining its action to purely judicial business. To any one imbued with the traditions of English procedure (as in the case of the framers of the American Constitution), it must have seemed impossible to let a Court decide upon anything but the case before it. To any one who had inhabited a colony governed under a charter, the effect of which on the validity of a Colonial Law was certainly liable to be considered by the English Privy Council, there was nothing startling in empowering the judiciary to pronounce in given cases upon the constitutionality of Acts passed by assemblies whose powers were limited by the Constitution, just as

the authority of the Colonial Legislature was limited by Charter or by Act of Parliament. To the Judges will likewise appertain under Articles 65 and 66, the power of deciding in given cases whether an Act of the Irish Parliament is valid, having regard to the provisions of the Constitution. The words of these Articles establish this position. Article 65 provides : " The judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution. In all cases in which such matters shall come into question, the High Court alone shall exercise original jurisdiction."

Article 66 provides : " The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever : Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

The courts of law will inevitably become the interpreters of the Constitution, and these courts, in construing the provisions of the Irish Constitution with reference to the Treaty, will perform purely judicial functions and limit their decisions to the cases before them without pronouncing any opinion whatever upon the validity of the Acts of the Irish Parliament. This presumption receives confirmation from the reply delivered by Mr. Churchill on behalf of the Government to a question addressed to him in the House of Commons on the 22nd November, 1921. Mr. Churchill, in reply to Sir William Davison, who asked what was the court or body which was entitled to decide whether any provision of the Constitution of the Irish Free State was repugnant to any of the provisions of the Treaty and was empowered to declare inoperative any such provision, replied as follows: "The question to which the hon. member refers may be raised before any court in which it is a material issue. The High Court of the Free State would have primary jurisdiction to determine the question, subject to an appeal to the Supreme Court of the Free State. I would further refer the hon. member to the proviso to Article 65 (now Article 66) of the draft Constitution, which provides that nothing in the Constitution shall impair the right of any person to petition His Majesty for special leave to appeal

from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

In an "official explanation," issued by the Publicity Department of the Provisional Government of Southern Ireland, the functions of the courts of law in construing and interpreting the provisions of the Irish Constitution are thus expounded and explained: "The Supreme Judicial Authority in the country will reside in a Court of Final Appeal, to be known as the Supreme Court, at which appeals from other courts will be heard and decided. Power is given to the courts to interpret the law, having regard to the provisions of the Constitution. A notable achievement with respect to the Judiciary is the insertion of the South African precedent in connection with appeals to the Judicial Committee of the British Privy Council. The South African precedent in this respect is by far the best in Dominion Constitutions."

The Irish Constitution differs widely from the Irish Constitution generally known as "Grattan's Constitution," which was established from 1782 till the Union in 1800. The Irish Parliament, under the Constitution of 1782, was a sovereign and independent Legislature, under whose provisions there was no appeal whatever to English tribunals from the decisions of the Irish courts of law. The claim of the English Parliament to enact laws binding on Ireland went hand-in-hand

with the claim of English courts of law to exercise an appellate jurisdiction over Irish courts. A collision of extraordinary violence between the Irish and the English Houses of Lords in 1719 was the direct cause of the famous statute, 6 George I, c. 5 (English) which asserts in the most emphatic terms the subjection of the Parliament of Ireland to the Parliament of Great Britain, and which also denies all power of appellate jurisdiction to the Irish House of Lords. In 1719 the case of *Sherlock v. Annesley* was tried in the Irish Court of Exchequer. Annesley obtained a decree which on appeal the Irish House of Lords reversed. From this decision Annesley appealed to the English House of Lords, who confirmed the judgment of the Irish Exchequer and issued process to put him into possession of the property in dispute. Sherlock petitioned the Irish House of Lords against the usurped authority of England, and they having taken the opinion of the Irish judges, resolved that they would support their jurisdiction by giving relief to the petitioner. Sherlock was put into possession by the Sheriff of Kildare, who refused to obey an injunction issued from the Court of Exchequer in Ireland directing him, pursuant to the decree of the English House of Lords, to restore Annesley. The sheriff was protected by the Irish House of Lords, who took the bold course of imprisoning the Barons of the Exchequer for acting on the decision of the English



House. The Irish Lords at the same time forwarded a powerful State paper to the Throne recapitulating Irish rights and Irish legal jurisdiction. The King, however, laid the address of the Irish Lords before the English House, and that House reaffirmed their proceedings and supplicated the Throne to confer some special mark of favour on the Barons of the Irish Court of Exchequer. This constitutional conflict between the English and Irish courts produced the Statute 6 Geo. I (England). This statute, except as a challenge to the Irish Parliament, was obviously of no value. If the English Parliament and the English House of Lords had the jurisdiction claimed for them the Act was superfluous ; if they had not, the English Parliament alone could not by the passing of the Act confer jurisdiction upon them. In 1782 the Act of 6 Geo. I was repealed by the British Parliament (22 Geo. III, c. 53), and the claim advanced by the British Parliament to legislate for Ireland and to exercise a right of final jurisdiction abandoned. It was, however, urged at the time that the simple repeal of the statute was insufficient to secure the complete legislative and judicial independence of Ireland. The objection was overruled. Lord Mansfield, however, in Michaelmas Term, 1782, as Lord Chief Justice of England, after this question of renunciation as distinguished from simple repeal had been raised, pronounced judgment on an Irish appeal. The case, however,

had been carried to England long before the repeal of the Act of Geo. I. Complaints were made of Lord Mansfield's decision in the British House of Commons. In 1783 an Act known as the Renunciation Act (22 Geo. III, c. 28) was passed by the British Parliament "for removing and preventing all doubts which have arisen or may arise concerning the exclusive rights of the Parliaments and Courts of Ireland in matters of legislation and jurisdiction, and for preventing any writ of error or appeal from any of His Majesty's courts in that Kingdom from being received, heard, or adjudged in any of His Majesty's courts of the Kingdom of Great Britain." Under Grattan's Constitution the Irish House of Lords was the ultimate and exclusive Court of Appellate Jurisdiction. Since the Union the House of Lords of the United Kingdom has been for Ireland the ultimate tribunal of Appellate Jurisdiction. Under the provisions of the Irish Constitution appeals to the Judicial Committee of the British Privy Council from the Irish courts are in some special instances admissible (see Article 65). An Irish appeal to the Judicial Committee of the Privy Council or to its predecessor, an open committee of the whole Council, would be heretofore inconsistent with the constitutional status of Ireland. Before the Union Ireland had, unlike the other Dominions of the Crown, a House of Lords,

and after the Union the House of Lords of the United Kingdom succeeded the Irish House of Lords as a Court of Appellate Jurisdiction, whereas the Privy Council as an appeal tribunal advised the King on appeals from courts of the Dominions and Colonies. Irish appeals came within the jurisdiction of the House of Lords.

But above all under the provisions of the Constitution of the Irish Free State an extraordinary power is vested in a purely judicial personage. In the case of Money Bills, in reference to which the Dáil Eireann has legislative authority exclusive of the Seanad Eireann, it is provided that in certain conditions the question whether a Bill is or is not a Money Bill will be decided by a judge. Article 35 of the Constitution provides : " The Chairman of Dáil Eireann shall certify any Bill which in his opinion is a Money Bill to be a Money Bill, but, if within three days after a Bill has been passed by Dáil Eireann two-fifths of the members of either House by notice in writing addressed to the Chairman of the House of which they are members so require, the question whether the Bill is or is not a Money Bill shall be referred to a Committee of Privileges consisting of three members elected by each House, with a Chairman who shall be the senior judge of the Supreme Court able and willing to act, and who, in the case of an equality of votes, but not

otherwise, shall be entitled to vote. The decision of the Committee on the question shall be final and conclusive."

When it is remembered that under the provisions of Article 6 of the Irish Free State Constitution the judges are in reality though not in name invested as guardians of the inviolability of the liberty of the person, with the means of hampering and supervising the whole administrative action of the Government ; with the power of interpreters of the Constitution in given cases coming before them judicially ; of pronouncing on the constitutionality or otherwise of the laws of the Irish Legislature ; of deciding under certain conditions whether Bills are or are not Money Bills, a matter on which the jealousy of the elected representatives of the people is proverbial ; in fact of interfering indirectly but none the less effectively with the action both of legislation and of administration ; the method of appointment, the terms of office, and the relation of the Irish Judiciary to the Executive under the provisions of the Constitution of the Irish Free State, may well be considered in the study of the 6th Article. I may call that Article the *Habeas Corpus* Article, or the Power of Judges Article of that Constitution. The extent of the power of the Irish Judiciary is of an importance which it would be difficult to exaggerate. We have seen what the judges can do. Let us now consider who those judges are—a matter of enormous import

having regard to the control which they can exercise over both the legislature and executive. Article 68 provides : “ The judges of the Supreme Court and of the High Court and of all other Courts established in pursuance of this Constitution shall be appointed by the Representative of the Crown on the advice of the Executive Council. The judges of the Supreme Court and of the High Court shall not be removed except for stated misbehaviour or incapacity, and then only by resolutions passed by both Dáil Eireann and Seanad Eireann. The age of retirement, the remuneration and the pension of such judges on retirement, and the declarations to be taken by them on appointment, shall be prescribed by law. Such remuneration may not be diminished during their continuance in office. The terms of appointment of the judges of such other courts as may be created shall be prescribed by law.”

Under the provisions of the Courts of Justice Act, 1924, the High Court (sec. 4) and the Supreme Court (sec. 5) have been constituted. The age of retirement (sec. 12) of the judges of the High Court and the Supreme Court has been fixed. The remuneration (sec. 13), pensions (secs. 14 & 15) and qualification for appointment of all judges of the High Court and Supreme Court declared, while it is provided (sec. 39) that the judges constituted under the provisions of the Courts of Justice Act, 1924, shall hold office by the same terms as the

judges of the High Court and the Supreme Court. Article 69 provides: "All judges shall be independent in the exercise of their functions, and subject only to the Constitution and the law. A judge shall not be eligible to sit in the Oireachtas, and shall not hold any other office or position of emolument."

The appointments to the Judiciary are, under the provisions of the Constitution of the Free State, practically vested in the Cabinet as a whole. Judicial appointments in England are no doubt formally made by the Sovereign as the Fountain of Honour, but appointments of puisne judges are made on the advice of the Lord Chancellor alone. So strictly has this custom or practice been observed that a Lord Chancellor has refused to entertain the request of the Prime Minister of the day to appoint a gentleman, himself member of the House of Commons supporting the Government, to a judgeship. This gentleman was subsequently appointed to a puisne judgeship by a Lord Chancellor in an Administration to which he was sitting in opposition in the House of Commons at the time. He was eventually appointed by the Government of the day (of which he had been a supporter), as distinct from the Lord Chancellor of that Government, to high judicial office. The appointments in England to the higher judicial offices are made by the Government, when the Prime Minister, of course, has a

powerful, and, if he should insist, a final voice in the recommendation. So strictly has the rule in England—that the Lord Chancellor alone should recommend in the case of appointments to puisne judgeships—been observed, that Lord Chancellor Eldon, on being solicited by George IV to recommend to him a certain gentleman for appointment to one of these positions, at once offered to resign the Great Seal. The King immediately retreated from the position he had assumed, and withdrew his request. In Ireland judicial appointments high or low were Government appointments, and made as it has been admitted in Parliament, on political grounds.

Appointment of the judges by the representative of the Crown on the advice of the Executive Council, may be regarded as not unattended with danger from a constitutional point of view. The independence of the judges is no doubt secured, but the method of their appointment on the nomination of the Executive, is subject to exception from the tendency to make the selection under such circumstances on the ground more of political services than professional merit. It is no doubt true that in England the highest judicial preferments in the necessity of things are made by the Government, and are, in the main, political appointments, but the recommendations to puisne judgeships are made as I have stated, by the Lord Chancellor alone, on the

grounds of professional merit. The Irish judges will be appointed by an authority which is not judicial, and when the decisions of a court control the actions of Government, there exists, to use the words of Professor Dicey in relation to the working of the American Constitution, "an irresistible temptation to appoint magistrates who agree (honestly, it may be) with the views of the Executive. A strong argument pressed against Mr. Blaine's election was that he would have the opportunity as President of nominating four judges, and that a politician allied with railway companies, was likely to pack the Supreme Court with men certain to work the law in favour of mercantile corporations. The accusation may have been baseless, the fact that it should have been made, and that even Republicans should declare that the time had come when 'Democrats' should no longer be excluded from the bench of the United States, tells plainly enough of the special evils which must be weighed against making the courts rather than the legislature the arbiters of the Constitution." (See Dicey's *Law of the Constitution*, pp. 165-166.) In England, moreover, the Lord Chancellor alone is responsible for the appointment and removal of County Court judges in which, by statute (51 & 52 Vic., c. 43), he acts independently of the Crown, and of course, independently of the executive government, of which he is a member.



The provision in Article 68 of the Irish Constitution that judges of the Supreme Court and of the High Court shall not be removed except for "stated misbehaviour or incapacity," and then only by resolutions passed by the Chamber and the Senate, seems to vest in the Houses of the Irish Parliament alone the power of the dismissal of judges ; whereas in England judges hold office during good behaviour, but upon address of both Houses of Parliament to the Crown it may be lawful to remove them. / In one case only, that of Sir Jonah Barrington, a judge of the High Court of Admiralty in Ireland, has a judge been dismissed by the Crown, acting on an address of both Houses of Parliament. In England judges hold as regards the Crown during good behaviour, as regards Parliament also during good behaviour, though the two Houses might extend the term so as to cover any form of misconduct which would destroy public confidence in the holder of the office. Under the Irish Constitution the power which seems to belong to the Crown in England, to remove the holder of a judicial position from an office forfeited by breach of the condition of tenure—such as misbehaviour in the performance of official duties, refusal or deliberate neglect to attend to them, or, it would seem, conviction for such an offence as would render the convicted person unfit to hold a public office, will, under the provisions of the Irish Constitution, be exercisable

only after resolutions to that effect have been passed by both Houses of the Irish Parliament. Appointments in England, made during good behaviour, as in the case of judgeships, create a life interest in the office unless made specifically for a term of years. By the provisions of the Irish Constitution the age of the retirement of judges may be fixed by law, and the provision whereby removal from the bench for incapacity may be enforced places the judicial tenure under the Irish Constitution on a basis in some respects more conducive to the interests of the public and of the Bench and Bar than in England.

A debate in the House of Commons in July, 1874, is of interest in this connection. Mr. Butt moved a resolution, which had the support of the party of which he was the Leader, declaring that, in the opinion of the House of Commons, recommendations to the Crown for appointments to the Irish Judicial Bench should be as in England, grounded on professional merits alone and made irrespective of political services or considerations. Mr. Butt drew a very poignant contrast between the English system of recommendation for judicial appointments on the merits with the Irish system of recommendation for such appointments for party services and for reasons in which the effective administration of justice was not included nor even considered. The recommendation for appointment to judgeships

which appertains to the Cabinet is subject to the danger that such appointments may be on political rather than on professional grounds. Such dangers have arisen on the appointment of judges in America to which Professor Dicey thus alludes :

“ From the fact,” he writes, “ that the judicial bench supports (under federal institutions) the whole stress of the Constitution a special danger arises lest the judiciary should be unequal to the burden laid upon them. In no country has greater skill been expended in constituting an august and impressive national tribunal than in the United States. Moreover, the guardianship of the Constitution in America is confided not only to the Supreme Court but to every judge throughout the land. Still, it is manifest that even the Supreme Court can hardly support the duties imposed on it. No one can doubt that the varying decisions given in the legal-tender cases, or in the line of recent judgments, of which *Munn v. Illinois* is a specimen, show that the most honest judges are after all only honest men, and when set to determine matters of policy and statesmanship will be necessarily swayed by political feeling and by reasons of State. But the moment that this bias becomes obvious a court loses its moral authority, and decisions which might be justified on grounds of policy excite national indignation and suspicion when they are seen not

to be fully justified on grounds of law. American critics indeed are to be found who allege that the Supreme Court not only is proving, but always has proved, too weak for the burden it has been called upon to bear." (Dicey's *Law of the Constitution*, pp. 164-165.) The objection that under the provisions of the Free State Constitution judges are appointed by the Executive, and that such appointments are liable to be made from party or political services or considerations, is serious. The effect of this admitted weakness in that Constitution which is probably unavoidable is, however, very sensibly diminished by several powerful checks. The same Article (Article 68) which prescribes the method of the appointment of judges provides that the judges of the Supreme Court and of the High Court shall not be removed except for stated misbehaviour or incapacity, and then only by resolutions passed by both the Dáil Eireann and the Seanad Eireann. Under the provisions of the Act of Settlement in Great Britain and of the Tenure of Judges Act of 1782 in Ireland, it is provided that the judges hold office during good behaviour, "but upon an address of both Houses of Parliament it may be lawful to remove them." This has been construed to mean that they can only be removed on an Address of the two Houses. Sir William Anson, however, thinks the words mean simply that if in consequence of misbehaviour in respect of his office,

or from any other cause an officer of state holding on this tenure has forfeited the confidence of both Houses, he may be removed although the Crown would not otherwise have been disposed to remove him. Such offices are held as regards the Crown during good behaviour, though the two Houses may extend the term so as to cover any form of misconduct which would destroy public confidence in the holder of the office. Under the Irish Constitution the Chambers of the Irish Legislature alone have the power of removing a judge, and the provisions that such removal must be for stated misconduct or incapacity precludes all possibility of any such removal being effected by the operation of prejudice, or other unworthy motive, by subjecting in the necessity of things the action of the Chambers to the judgment of the people at large.

It is worthy of note that whereas in Great Britain the Parliamentary control of the judges is in addition to the power of removal which the Crown possess if a judge should misconduct himself in the business of his office, in Ireland the power of dismissal of a judge is vested exclusively in the two chambers of the Legislature by the passing of resolutions in favour of that course. Lord Brougham seems to think that the joint address of both Houses of Parliament only enables the Crown to remove a judge without compelling it to do so, and that each act of removal is like a statute requiring the

concurrence of the whole three branches of the Legislature. Under the provisions of the Irish Constitution the resolutions of both Houses in favour of the removal of a judge are separate and distinct, and do not, like a statute, require any formal assent of the Crown—the object of the provisions being to make the judges, in the words of Article 68, “independent in the exercise of their functions and subject only to the Constitution and the Law.”

The next Article (69) provides that all judges shall be independent in the exercise of their functions, and subject only to the Constitution and the law, that a judge shall not be eligible to sit in the Oireachtas, and shall not hold any office or position of emolument. The judges of the Supreme Court and of the High Court occupy positions of greater security in their tenure than the members of the English Judiciary, and the holders of these judge-ships are more strongly protected from temptations to enter into political strife or to be affected, albeit unconsciously, by political or party predilections and influences than the members of the English Judiciary.

In the very few instances in which the conduct of judges in recent times has been criticised, the alleged aberrations from judicial propriety have been largely indiscretions in charges to grand juries. Thus, in February, 1834, Mr. O’Connell, in the House of Commons, carried a motion for the

appointment of a committee to inquire into the conduct of Sir William Cusac Smith, one of the barons of the Irish Exchequer, in the deliverance from the Bench of partisan political harangues in his charges to grand juries (which have been now abolished in Ireland) when judge of assize. A few days before the discussion of the motion, O'Connell writes to a confidential friend: "I got the paper containing Baron Smith's charge. I hope to have a committee appointed on his case next Thursday." He writes, on the 14th February, 1834, "My victory in Baron Smith's case is a subject of gratulation. The fact is that Littleton (the Irish Secretary) and the Ministry went down to the House determined to oppose my motion. But I made so strong a case for inquiry that they felt it ought not to be resisted. The debate was curious. The Ministry was divided." The motion was a few days later rescinded on the ground that no investigation into the conduct of a judge should be instituted on grounds less serious than inconsistent, if proved, with the retention of his judicial position. The rescinding of the motion was by no means regarded as a vindication of the conduct of the judge, who resigned shortly afterwards. Then, in 1843, Mr. Thomas Duncombe brought forward a motion in relation to the conduct of Lord Chief Baron Abinger in the delivery of political charges to grand juries. The motion was defeated, but the words of Lord John

Russell in debate reflected the sentiments of Parliament and of the country. "The Lord Chief Baron," he said, "spoke as a politician and a lawyer, when he should only have spoken as a judge." The recent attacks in the course of ordinary debate on the conduct of members of the Judiciary, in the Parliament of the Union of South Africa, would not be possible in the House of Commons, where no question can be asked which reflects on the character or conduct of judicial personages, whose conduct and character cannot be impugned or debated save upon a substantive motion, which can be dealt with by amendment or the substantive vote of the House. This practice, which is highly salutary, is modern in its origin, and although strictly observed and indeed enforced, is embodied in no standing order of the House. The poignancy of contrast between the past and the present in this respect may be gauged by the fact that, in 1772, the directions to the jury of Lord Mansfield, in the case of the prosecution of the publishers of *Jurinus'* celebrated *Letter to George III* in 1770, although not questioned by a motion for a new trial, were violently attacked in both Houses of Parliament. In particular, Lord Chatham and Lord Camden answered Lord Mansfield vehemently in the House of Lords, and Lord Camden proposed questions to him which he refused to answer. "It would," writes Sir Fitzjames Stephen, "be wholly incon-



sistent with Lord Mansfield's duty as Lord Chief Justice to discuss in a Parliamentary debate the merits of a judgment given in the Court of King's Bench." The idea of a discussion of such a character would not have been entertained if judges observed, in relation to matters savouring of party politics, an absolute aloofness.

It is difficult to exaggerate the enormous import and value of the following provision in Article No. 69 of the Constitution of the Irish Free State. "A judge shall not be eligible to sit on the Oireachtas, and shall not hold any other office or position of emolument." The exclusion of a judge from both Houses of the Irish Legislature is in poignant contrast with the Constitution of the British Parliament. Every one of the members of the House of Lords is, according to the law of the land, and the theory of the Constitution, a judge. "The House of Lords," wrote Lord Brougham in 1862, "is the court of ultimate appeal on all questions of law whatever provided they are raised on any record, and in all questions of fact and all questions of law whatever which arise in the Courts of Equity. So says the letter of the Constitution. The highest judicial functions are combined with the highest legislative functions, and these are together vested in judges who succeed to these situations by inheritance, with the exception of a small number of Irish peers who are elected for life, and a smaller number

of Scottish peers who are elected for each Parliament. Every English peer on attaining the age of 21 years has as much voice in all these great questions as the Lord Chief Justice of England, or the Lord High Chancellor himself—such is the theory of the Constitution, and it may on any one occasion be made the practice. It was as nearly as possible so made in a late important political case, and in every case of this description—that is, in every case which makes the interference of the peers at large most to be deprecated—it is the most likely to happen.” (Brougham’s *English Constitution*, p. 359.) “For most purposes,” writes Sir William Anson in 1909, “the House of Lords is a final Court of Appeal from the King’s Courts in England, Scotland and Ireland. There is nothing but the Conventions of the House (of Lords itself) to prevent any Peer of Parliament from taking part in such appeals. An Act of 1876, the Appellate Jurisdiction Act, has provided that no appeal shall be heard and determined, unless there are present at such hearing and determination at least three Lords of Appeal. The Lords of Appeal are of three kinds—the Lord Chancellor for the time being, such Lords of Parliament as have held high judicial office, and the Lords of Appeal in Ordinary.” (Anson’s *Law and Custom of the Constitution*, Parliament I., p. 227.)

Under the provisions of the Irish Free State Constitution, the office of Lord Chancellor of Ireland, which was a political and executive as well as a judicial office, no longer exists. The Irish Lord Chancellorship before the Union was for several generations filled by the holder of an Irish peerage, who was *ex officio* Speaker of the Irish House of Lords. Since the Union it has been held at times by gentlemen holding peerages of the United Kingdom who have participated in proceedings in the House of Lords. One of these gentlemen was a member of the British Cabinet. The position of the Lord Chancellor of Great Britain is at once the measure of the value of the principle embodied in the Constitution of the Irish Free State—of keeping the legislative and judicial functions quite separate, on which Lord Brougham insists. “The highest of all the judges,” writes Lord Brougham, “the Lord Chancellor, holds his place during pleasure.” (Brougham’s *British Constitution*, p. 273.) Again, “the great principle of the judges’ independence is well observed in the English system. All the judges, except the Chancellor, hold their offices for life, only removable by a joint address of the two Houses of Parliament to which the Sovereign must assent, consequently only removable by an Act of the whole Legislature.” (Brougham’s *English Constitution*, p. 357.) Mr. Bagehot, writing in 1872, says, “the whole office of the Lord Chancellor is a

heap of anomalies. He is a judge, and it is contrary to obvious principle that any part of the administration should be extended to a judge, it is of very grave moment that the administration of justice should be kept clear of any sinister temptations. Yet the Lord Chancellor, who is our chief judge, makes party speeches in the Lords. Lord Lyndhurst was a principal Tory politician, and yet he presided in the O'Connell case. Lord Westbury was in chronic wrangle with the Bishops, but he gave judgment upon *Essays and Reviews*." Turning then from the British Upper Chamber, which is, as the Marquis Curzon has termed it, "a House of judges," to the British Lower Chamber, it will be seen that the principle of keeping legislative and judicial functions separate is not, as in the Irish Constitution, absolutely maintained. The English, Scottish, and Irish judges are no doubt disqualified from sitting in the English House of Commons. The judges of the three former English Common Law Courts were declared to be disqualified by a resolution of the House of Commons in 1605, they being "attendants as judges in the Upper House." The provisions of the Judicature Act, whereby all judges of the High Court of Justice and Lords Justices of Appeal are excluded from the House of Commons, has taken the place of this rule. The Scottish and the Irish judges were excluded from the British House of Commons by statute, but so

recently as 1897 a member of the House of Commons acted as a Commissioner of Assize. The Master of the Rolls in England enjoyed exemption from exclusion from the House of Commons until the passing of the Judicature Act in 1873. In the debate on the Judges Exclusion Bill on June 1, 1853, the eligibility of the Master of the Rolls for election to the House of Commons was preserved through the eloquence of Lord Macaulay, which had the effect of negating the motion for the third reading of the Bill. At the present moment, however, as we have seen in the case of the appointment of a member of the House of Commons as a Commissioner of Assize, and the retention of his seat by the present Recorder of London, Sir Ernest Wild, K.C., after his appointment to the Recordership ; by the fact that a Recorder is eligible to serve in Parliament except for the Borough of which he is Recorder ; by the union of the position of Chairman of Quarter Sessions and member of the House of Commons, that legislative and judicial functions are not in that assembly quite separate. County Court Judges are, however, ineligible by statute for election to the House of Commons. To the exclusion of judges from both Chambers of the Legislature of the Irish Free State, the ineligibility of judges from other offices or positions of emolument under the provisions of the Article 69 is a corollary. The provision forms part of the Irish

Judicature Act. Its origin is due to the appointment of a judge to the position of Commissioner of the Incumbered Estates Court, to be held in conjunction with his judgeship, and the appointment of another judge to the position of Commissioner of the Irish Church Temporalities to be held likewise in conjunction with his judgeship. The tendency of the Article will, no doubt, have the effect, if not in law certainly in practice, of rendering the holding of office, even if no emolument be attached thereto, incompatible with the tenure of a judicial office, and judges cannot be members of the Executive Council or Cabinet of the Free State. Lord Hardwicke when Chief Justice of the Common Pleas in England, and Lord Mansfield and Lord Ellanborough, when Lord Chief Justices of England, were Cabinet Ministers, just as the Chiefs of the Irish Law Courts, certainly before the Union, were active members of the effective portion of the Irish Privy Council, commonly called the Irish Cabinet. For this reason alone it is conducive to the public interest that all the members of the Executive Council must be members of Dáil Eireann, and that judges are excluded both from the Seanad and the Dáil.

The effect of Article 69 will, moreover, probably be to restrict the energies in public matters of judges to their judicial duties, to stop the practice of the courts to suspend their sittings to enable the

judges to attend functions of State ; to abolish the custom of judges acting as members of public boards whose transactions may become the subject of litigation, and above all to sever the questionable relationship between members of the Bench and the Executive, which was maintained by the attendance of judges frequently to the serious dislocation of court business, and to the grievous expense of litigants at meetings of the Irish Privy Council. The Article will, moreover, be an all but insuperable barrier to the practice which in recent years has obtained in England and Scotland of the transference of members of the Executive to the Judicial Bench, and will render unthinkable the announcement in the Press on the eve of the General Election of 1922 in Great Britain—that two members of the Cabinet were waiting for judgeships.

Article 69 of the Constitution of the Irish Free State fulfils the ideal of Lord Brougham who so vehemently urged, to use his own words, that "the judicial should be kept entirely distinct from the legislative and executive power in the State." "Judges," wrote Lord Brougham, "ought to be excluded from all share in the Government of the State, and in countries living under a popular or aristocratic government they should be peremptorily excluded from seats in either popular or patrician assemblies. There is nothing so much to be dreaded as a popular judge. When Lord Bacon termed a

popular judge 'a hateful thing,' he restricted his observation to one form of the great mischief. A party judge is always detestable, and the corrupting influence of party connection is the more entirely to be dreaded, that it sways natures far too honest to be in any risk of being tainted by the influence of mere vulgar corruption." (Brougham's *British Constitution*, pp. 318-319).

In dealing with the 6th Article of the Constitution of the Irish Free State, by which the power of the Judiciary to preserve the liberty of the person as inviolable and to prevent the depreciation of that liberty in the case of any person, except in accordance with law, is set forth as a declaration of a fundamental right, I have been induced to discuss by way of anticipation Articles 68 and 69 of that Constitution setting forth the method of appointments, the tenure, and the conditions to which that tenure is subject of the Irish Judiciary who are invested with powers so enormous of hampering and controlling the Executive in action interfering with the liberty of the subject. Article 6 concludes with a proviso which bears a very striking similarity to a provision in the Irish *Habeas Corpus* Act of 1782, entitled an Act for Better Securing the Liberty of the Subject, which differs from the English in not extending to the prevention of imprisonment beyond the seas. In this Act was contained a power for the Chief Governor and Privy Council of Ireland



to suspend the Act by proclamation under the Great Seal during such term as there should be an actual invasion or rebellion in Ireland or Great Britain.

The proviso with which Article 6 concludes is as follows: "Provided, however, that nothing in this Article contained shall be invoked to prohibit control or interfere with any act of the military forces of the Irish Free State during the existence of a state of war or actual rebellion." This proviso, incorporated in a declaration of a fundamental right, savouring of a limitation of that right, is only a safeguard of the very existence of the Irish Free State, and a protection against chaos. The proviso is simply an enunciation of a doctrine vital to the preservation of any community—and is thus expounded and explained by Lord Chief Justice Molony in pronouncing the judgment of the King's Bench Division, that it had no jurisdiction to interfere with the proceedings or sentence of a military court, and that it must refuse the application for the issue of a writ of *Habeas Corpus* in the case of *The King v. Allen*. "It is the sacred duty of this Court," he said, "to protect the laws and liberties of all His Majesty's subjects, and to see that no one suffers loss of life or liberty save under the laws of the country, but when subjects of the King rise in armed insurrection, and the conflict is still raging, it is no less our duty not to interfere with the officers of the Crown in taking such steps as they deem

necessary to quell the insurrection, and to restore peace and order, and the authority of the law." As regards the powers of an Executive Government in dealing with an armed insurrection, Lord Chief Justice Molony says, "The Government is entitled and indeed bound to repel force by force, and thereby to put down the insurrection and restore public order. As was stated by Lord Halsbury in *Tilanki v. The Attorney-General of Natal* (1907, A. C. 93-95): Such acts of force are justified by necessity by the fact of actual war, and that they are so justified under the circumstances has been over and over again decided by Courts as to whose authority there is no doubt. . . . It is also clear on the authorities that when Martial Law is imposed, and the necessity for it exists; or, in other words, while war is still raging, this court has no jurisdiction to question any acts done by the military authorities (*ex p. Marais*, 1902, A. C., p. 109), although after the war is over persons may be made liable civilly and criminally for any acts which they are proved to have done in excess of what was reasonably required by the necessities of the case (*Governor Wall's Case*, 28 *State Trials*, p. 759), unless these acts have in the meantime been covered by an Act of Indemnity."

On the 25th July, 1923, appeals from the Irish Courts came for consideration for the first time before the Judicial Committee of the Privy Council. Two

out of three petitions for leave to appeal were dismissed, while the third was withdrawn by consent. The general principles in relation to the hearing of appeals from the Dominions and their limitations were the subject of a very illuminating explanation and exposition by Viscount Haldane before the commencement of the proceedings, which is in itself a pronouncement of the very highest value of the constitutional position obtaining in relation to the hearing by the Judicial Committee of the Privy Council of appeals from the Dominions, and the circumstances under which such appeals may be sustained. The statement of Lord Haldane, interpolated as it was by remarks of eminent counsel appearing in the appeal cases, and of Lord Buckmaster who, with Lord Parmoor constituted the Committee over which Lord Haldane presided, may well be regarded as an authoritative formulation of the constitutional morality governing appeals from the Dominions as well as a declaration of Ireland's incontrovertible Dominion status.

Before the commencement of the proceedings, Viscount Haldane said that it would be just as well that something should be said about the general principles governing matters such as Irish petitions, and on that they might wish to know what the Attorney-General for Ireland and the other learned counsel had to say.

“ The question,” said Viscount Haldane, “ was upon what general principles their lordships should proceed. In order to ascertain that it was first necessary that they should remind learned counsel in what capacity the Committee of the Privy Council dealt with these questions. They were not Ministers in any sense. They were a Committee of Privy Councillors, who were acting in the capacity of judges, but the peculiarity of the situation was that, it was a long standing constitutional anomaly, that they were really a Committee of the Privy Council giving advice to His Majesty, but in a judicial spirit. They had nothing to do with politics, or policies, or party considerations. They were really judges, though in form and name they were the Committee of the Privy Council. The Sovereign gave the judgment itself, and always acted upon the report they made. In substance what took place was a strictly judicial form of proceeding. The judicial Committee of the Privy Council was not an English body in any exclusive sense, and he mentioned that for the purpose of bringing out the fact that they were not a body, strictly speaking, with any location. The Sovereign was everywhere throughout the Empire in the contemplation of the law. In Ireland, under the Constitution Act, by Section 66, the prerogative of the Sovereign was saved, and the prerogative, therefore, existed in Ireland, just as

it did in Canada, South Africa, and India, and right through the Empire, with the single exception of Australia, and in that case it only had reference to constitutional disputes. He need not observe that the growth of the Empire, and particularly of the Dominions, had led to a very substantial restriction of the exercise of the prerogative by the Sovereign on the advice of the Judicial Committee. It was obviously proper that the Dominions should more and more dispose of their own cases, and in criminal cases it had been laid down so strictly, that it was only in most exceptional cases that the Sovereign was advised to intervene. In other cases the practice which had grown up, or the unwritten usage which had grown up, was that the Judicial Committee of the Privy Council was to look closely into the nature of the case, and, if in their lordships' opinion the question was one that could be best determined on the spot, then the Sovereign was not, as a rule, advised to intervene, normally, unless the case was one involving some great principle, or was of some very wide public interest. It was also necessary to keep a certain discretion, because the Dominions differed very much. With regard to Ireland it was not expedient that they should lay down too rigidly, to begin with, what the principles were. They would grow with the unwritten constitution. They

had a Constitution which was partly written in Ireland, but their experience was that all unwritten constitutions developed flesh and blood within the unwritten bones, and they had to see the sort of flesh and blood they put on, as regarded the question of how much they disposed completely of their own judicial questions. Appeal to the Privy Council was not as a right, but at the King's discretion, and was founded on a petition that he should exercise his discretion. A matter of discretion was a very different thing from what was a matter of right, and accordingly, when they came from a new Dominion with full Dominion status, like the Irish Free State, it was not by any means a matter of course that leave to appeal would be given. As the Sovereign might be advised to apply the general principle of the restriction, and, that being so, they would have to look into the petitions one by one, and they would bear in mind that the status of the new Irish Dominion was a status which was not strictly analogous to a number of Dominions in the Treaty Act. Southern Ireland was a unitary Dominion, and was analogous from the point of view of justice, therefore, to unitary Dominions like South Africa, more than to non-unitary Dominions like Canada and Australia. They were merely laying down the results of the Committee's experience."

Mr. Hugh Kennedy, K.C. (Attorney-General, and now Chief Justice of the Irish Free State)

expressed indebtedness to their lordships on behalf of the Irish Bar, and said that he had wished to call attention to the fact that Ireland was a unitary country, and analogous to South Africa, rather than to the Federal Dominions, which had a direct appeal from the provincial courts. There was an indication in the Irish Constitution to make the Court of Appeal, so called, final. They took the same restrictive view of the jurisdiction as they took in the case of a unitary state, or of Canada, which actually sought to limit it altogether, but did not quite succeed.

Serjeant Hanna referred to the geographical situation of the Irish Free State as compared with that of other unitary systems. The people of Northern Ireland and the people of the Irish Free State always had, and still had, as regarded litigation amongst themselves, the appeal to the House of Lords ; but if it were to be thought that where there were commercial transactions between people in Northern Ireland and people in Southern Ireland that by reason of the contracts having been made with one place or the other, the method of appeal should differ, it might afford very serious consideration.

Lord Haldane said that he quite appreciated the difficulties alluded to, which, in certain cases, might be very real difficulties. The general principle was the first thing to start with.

Serjeant Hanna called attention to the fact that the status of the Irish Free State was, under Article 2 of the Treaty, the same as the status of Canada, and not South Africa. If it were to be construed that appeal from the Irish Free State tribunals was to be similar to those from South Africa, he would have respectfully submitted that that was a contravention of Article 2 of the Treaty.

Lord Buckmaster was not sure that the point raised had any real substance, because the Statute had made it quite plain that, so far as possible, finality and supremacy were to be given to the Irish Courts.

Serjeant Hanna remarked that he had made his respectful submissions to their lordships.

Lord Haldane said that as this was the first case on which application had been made from the Irish Free State for leave to appeal, they were simply laying down the meaning of the unwritten Constitution as it existed in the Empire, and as it applied to the Irish Free State, just as it applied to the other Dominions. This was one of the first steps in the Irish unwritten Constitution, and it was a very interesting one.



**Article 7.**

*The dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law.*

A particular and tender regard is paid by the law, in the words of Blackstone, to the immunity of a man's house, which it styles his castle and will never suffer to be violated with impunity, agreeing herein with the sentiment of ancient Rome as expressed in the words of Cicero : *quid enim sanctius quid enim religione munitius quam domus anius-cujusque civium*. For this reason no outward doors can in general be broken open to execute any civil process, though in critical cases the public safety supersedes the private. Hence, also in part arises the animadversion of the law upon eavesdroppers, nuisances, and incendiaries, and to this principle it must be assigned that a man may assemble people together lawfully (at least if they do not exceed eleven), without danger of raising a riot or unlawful assembly, in order to protect and defend his house which he is not permitted to do in any other case. (Stephen's *Blackstone*, IV., p. 195). Lord Camden in *Buckle v. Money* (2 Wils. p. 205), spoke those memorable words : " To enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the Spanish Inquisition—a

law under which no Englishman would wish to live an hour." It is a daring public attack on the liberty of the subject, and a violation of the 39th Chapter of Magna Charter (*nullus liber homo, etc.*), which is directly pointed against that arbitrary power." The Corporations of Dublin, Bath, Exeter, and Norwich, besought Lord Camden to accept their freedom. London enrolled him among her citizens, and placed upon the walls of Guildhall his portrait, painted by Sir Joshua Reynolds, with an inscription: "In honour of so eminent a man, assertor by the law of English liberty."

#### Article 8.

*Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any*

*religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation.*

The declaration of fundamental rights embodied in this Article presents a pleasing contrast with the Irish Penal Code which, in the words of Mr. Lecky, was intended to deprive three-fourths of the Irish nation of all civil life. "By an Act of the English Parliament Roman Catholics were forbidden to sit in that of Ireland. They were afterwards deprived of the election franchise, excluded from the corporations, from the magistracy, from the bar, from the bench, from the grand juries, and from the vestries. They could not be sheriffs, or solicitors, or even 'gamekeepers or constables.' . . . The legislation on the subject of Roman Catholic education amounted to universal unqualified and unlimited proscription. The Catholic was excluded from the university. He was not permitted to be the guardian of a child. It was made penal for him to keep a school, to act as usher or private tutor, or to send his children to be educated abroad, and a reward of £10 was offered for the discovery of a Popish schoolmaster. In 1733, it is true, charter schools were established by Primate Boulter for the benefit of the Catholics, but these schools, which were

supported by public funds, were avowedly intended by bringing up the young as Protestants to extirpate the religion of their parents. The ultimatum offered by the law to the Catholics was that of absolute and compulsory ignorance—or of an education directly subversive of their faith. . . . No Roman Catholic was suffered to buy land or inherit or receive it as a gift from Protestants, or to hold life annuities or loans for more than thirty-one years, or any lease on such terms that the profits of the land exceeded one-third of the rent. . . . The few Roman Catholic landlords who remained after the confiscation were deprived of the liberty of testament which was possessed by all other subjects of the Crown. Their estates upon their death became equally divided among their sons, unless the eldest became a Protestant, in which case the whole was settled upon him.” (See Lecky’s *History of England in the 18th Century*, I., pp. 283-288.)

#### Article 9.

*The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming*

*associations and the right of free assembly may be exercised shall contain no political, religious or class distinction.*

Professor Dicey directs attention to the fact that no principle of freedom of discussion is recognised in English law. The notion, he maintains, justified though it be to a certain extent by the habits of modern English life, that the right of the free expression of opinion is a fundamental doctrine of the law of England in the same sense in which it was part of the French Constitution of 1791, is essentially false, and conceals the real attitude of what is described as the right to the free expression of opinion. "At no time," he writes, "has there in England been any proclamation of the right of liberty of thought or freedom of speech. The true state of things cannot be better described than in those words: 'Our present law permits any one to say, write and publish what he pleases, but if he makes a bad use of this liberty he must be punished. If he unjustly attack an individual the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment.' (Odgers, on Libel and Slander, p. 12). Any man may, therefore, say or write whatever he likes subject to the risk of, it

may be, severe punishment if he publishes any statement (either by word of mouth or writing or in print), which he is not legally entitled to make."

(Dicey's *Law of the Constitution*, pp. 254-255.)

The right of free expression of opinion is in England, in Professor Dicey's judgment, little else than that of writing or saying anything which a jury think it expedient should be said or written. "Such

liberty," he writes, "may vary at different times and seasons from unrestricted licence to very severe restraint, and the experience of English history during the last two centuries shows that under the law of libel the amount of latitude conceded to the expression of opinion has in fact differed greatly according to the condition of popular sentiment."

(Dicey's *Law of the Constitution*, p. 261.)

The right to assemble peaceably and without arms, which is also guaranteed by this Article subject to laws regulating that right, is not recognised as a specific right in the English Constitution. "No better instance," writes Professor Dicey, "can indeed be found of the way in which in England the Constitution is built upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A. B. and C. to meet together, either in the open air or elsewhere, for a lawful purpose,

but the right of A. to go where he pleases so that he does not commit a trespass, and to say what he likes, so that his talk is not libellous or seditious ; the right of B. to do the like with regard to A., and the existence of the same rights of C. D. E. and F. and so on *ad infinitum*, leads to the consequence that A. B. C. D. and a thousand or ten thousand other persons may, as a general rule, meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner. . . . Here then you have in substance that right of public meeting for political and other purposes which is constantly treated in foreign countries as a special privilege to be exercised only subject to careful restrictions." (Dicey's *Law of the Constitution*, pp. 285-286.) The proviso that the right to assemble must be exercised peaceably and without arms seems designed to prevent the meeting from being an unlawful assembly. "A public meeting which from the conduct of those engaged in it, as for example from their marching together in arms, threatens a breach of the peace on the part of those holding the meeting, and therefore, fills peaceable citizens with reasonable fear, is an unlawful assembly." (Dicey's *Law of the Constitution*, p. 287.) Associations and unions, the right to whose formation is guaranteed, are distinguished from associations opposed to public morality. The character of the clubs and societies which are un-

lawful combinations and confederacies is set forth in Stephen's *Digest of the Criminal Law*, Article 86, p. 51.

#### **Article 10.**

*All citizens of the Irish Free State (Saorstát Eireann) have the right to free elementary education.*

#### **Article 11.**

*All the lands and waters, mines and minerals, within the territory of the Irish Free State (Saorstát Eireann) hitherto vested in the State, or any department thereof, or held for the public use or benefit, and also all the natural resources of the same territory (including the air and all forms of potential energy), and also all royalties and franchises within that territory shall, from and after the date of the coming into operation of this Constitution, belong to the Irish Free State (Saorstát Eireann), subject to any trusts, grants, leases or concessions then existing in respect thereof, or any valid private interest therein, and shall be controlled and administered by the Oireachtas, in accordance with such regulations and provisions as shall be from time to*



*time approved by legislation, but the same shall not, nor shall any part thereof, be alienated, but may in the public interest be from time to time granted by way of lease or licence to be worked or enjoyed under the authority and subject to the control of the Oireachtas : Provided that no such lease or licence may be made for a term exceeding ninety-nine years, beginning from the date thereof, and no such lease or licence may be renewable by the terms thereof.*

The *Times* directs special attention to the declaratory article in the Irish Constitution that the rights of the State in and to natural resources, the care of which is of national importance, shall not be alienated, and that the exploitation of such resources by private individuals or associations shall be permitted only under State supervision. "Some of the declaratory clauses," writes the *Times*, "are significant and none more so than the formal assertion of State rights in natural resources. This, like others of these clauses, can only be tested in its actual working. In theory many vested interests seem to have been swept aside; in practice none of them need to be disturbed." This Article is invested with an enhanced interest by the fact that the decision in the case of *Munn v. Illinois* (4 Otto. Rep. 113), shows that the American courts are

opposed to uphold any laws which prohibit modes of using private property which seem to the judges inconsistent with public interests.

#### **Article 12.**

*A Legislature is hereby created to be known as the Oireachtas. It shall consist of a King and two Houses, the Chamber of Deputies (otherwise called and herein generally referred to as "Dáil Eireann") and the Senate (otherwise called and herein generally referred to as "Seanad Eireann"). The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Eireann) is vested in the Oireachtas.*

Article 12 of the Irish Constitution provides that a Legislature is thereby created to be known as the Parliament of the Irish Free State, and that it shall consist of the King and two Houses. The Irish Parliament shall, accordingly, consist of a king and two estates, whereas the British Parliament consists of a king and three estates. "The constituent parts of a Parliament are," writes Blackstone, "the sovereign sitting there in his royal political capacity and the three estates of the realm, the Lords Spiritual and the Lords Temporal who sit together

with the sovereign in one House, and the Commons, who sit by themselves in another. And the sovereign and these three estates form the great corporation or body politic of the kingdom." (Stephen : *Blackstone*, II., pp. 350-351). For all practical purposes, Professor Freeman well observes, there are only two estates in the British Parliaments—Lords and Commons. For centuries back there has been no separate estate of the clergy, some of whose highest members have belonged to the estate of the Lords and the rest to the estate of the Commons. Hence has arisen a common but not unnatural misconception, a misconception as old as the days of the Long Parliament in England, as to the meaning of the phrase of the three estates, but which is not likely to arise in Ireland under the new Constitution. "Men," writes Professor Freeman, "constantly use those words (three estates) as if they meant the three elements among which the legislative power is divided—King, Lords, and Commons. But an estate means a rank or order, or class of men like the Lords, the clergy, or the Commons. The King is not an estate because there is no class or order of kings, the King being one person alone by himself. The proper phrase is *the King and the three estates of the realm* [and in Ireland under the new Constitution the proper phrase will be *the King and the two estates of the Irish Free State*]. In England the phrase is meaningless as we have, in

truth, two estates only." (Freeman's *Growth of the English Constitution*, pp. 97-98). Professor Freeman directs attention to the curious reference to the members of the estates in Roger North's *Examen*, p. 222, where it is said that Titus Oates, "busy in saving the King's life, could dispute learnedly against his authority upon the foolish republican conceit that he was one of the three estates co-ordinate with the rest."

The Irish Legislature, like the Legislatures of the Dominions and self-governing colonies, is bicameral—that is to say, the Legislative Assembly consists of two Chambers or Houses. The bicameral system which is a characteristic of the British Constitution, and of the many versions of that Constitution which has been adopted by the United States arose out of one of the accidents of English History. The number *two* became the number of the English Houses of Parliament, not out of any conviction of the advantages of that number, but because it was impossible to get the clergy in England to act as they did elsewhere as a regular Parliamentary body. They shrunk from the burden as they deemed secular legislation inconsistent with their profession.

Thus, instead of the clergy forming, as they did in France, a distinct estate of the Legislature, England had a Parliament of two Houses—Lords and Commons—attended with a kind of ecclesias-

tical shadow of the Parliament in the shape of two Houses of the ecclesiastical Convocation, and for all practical purposes there were only two estates in the English Parliament—Lords and Commons. (See Freeman's *Growth of the English Constitution*, pp. 97-98). Sir Edward Creasy thinks the division of the British Parliament into two Houses has been of infinite importance in constitutional history. "We have escaped thereby," he writes, "the miseries which the instability, the violence, and the impassioned temerity of a single legislative assembly have ever produced when that form of Government has been attempted, as it often was, in the Italian Republics of the Middle Ages, as it was for a short period in Pennsylvania and Georgia, and as it has been repeatedly essayed by revolutionary France, Spain, Naples and Portugal." Creasy's *Rise and Progress of the English Constitution*, pp. 197-198.) The Legislatures of the Dominions and self-governing colonies all follow the imperial pattern, although of the Canadian Provinces Quebec and Nova Scotia alone preserve an Upper Chamber. The Irish Constitution in the term Senate as the designation of its Second House, follows the example of the Federal Legislatures of Canada, Australia and the Union of South Africa, whose Upper Houses are called Senates. In the Unitary, as distinct from the Federal Legislatures, the Upper House is called a Legislative Council.

The term Senate seems more appropriate to the Second House of the Irish Free State, having regard to its Dominion status. The Chamber of Deputies as a designation of the popular branch of the Irish Legislature is a continental term not heretofore used in Constitutions founded on the British Constitution. In the Australian Commonwealth, and the Union of South Africa, and New Zealand, the popular Chamber of Legislature is called the House of Representatives; in Newfoundland, South Australia and Tasmania, the House of Assembly; and in the other self-governing colonies (as also in all the Canadian provinces), the Legislative Assembly. Only in the Dominion of Canada has the title House of Commons been conferred on a "Lower House." (See Jenkyns' *British Rule and Jurisdiction Beyond the Seas*, pp. 66-67.) The declaration that "the sole and exclusive power of making laws for the peace, order and good government of the Irish Free State is vested in the Oireachtas," must be taken (1) subject to the provisions in relation to the construction of the Constitution with reference to the Articles of Agreement for the Scheduled Treaty, set forth in the Second Section of the Irish Free State Act, 1922; (2) subject likewise to the legislative authority of the Dáil Eireann in the matter of Money Bills, exclusive of the Seanad Eireann under Article 35; (3) to the restriction to declaratory laws under Article 43; (4)

to the suspensory powers of the Seanad Eireann and Dáil Eireann under Article 47 ; (5) to the provisions for the initiation by the people of proposals for laws and constitutional amendments under Article 48 ; (6) to the sanction to amendments of the Constitution by a submission to a referendum of the people (Article 50) ; (7) to the judicial power of the High Court and the Supreme Court of the Irish Free State in deciding the question of the validity of any law having regard to the provisions of the Constitution (Articles 65-66).

The Irish Constitution as a written Constitution differs essentially from the British Constitution, which is not a written Constitution. We may search, in the words of Professor Dicey, the Statute Book from beginning to end, but we will find no enactment which purports to contain the articles of the British Constitution. The British Constitution consists of laws which are written laws found in the Statute Book, and of other most important laws which are unwritten laws that are not statutory enactments. Ireland has, accordingly, a Constitution unlike the British Constitution, but such as the Constitution of the United States, whose terms are to be found in a printed document. But as in the British Constitution which is unwritten, so in Ireland with a written Constitution, will undoubtedly arise stringent conventional rules, in some cases the calculated results of the operation of that Constitution, which though

they would not be noticed by any Court of Law will have in practice virtually the force of laws. This has actually been the case in the United States despite its written Constitution.

**Article 13.**

*The Oireachtas shall sit in or near the City of Dublin or in such other place as from time to time it may determine.*

Parliaments of Ireland, like the Parliaments of England, met in various places. Two of the most celebrated of Irish Parliaments, the Parliament of 1367, which passed the famous enactments known as the Statutes of Kilkenny, and the Parliament of 1495, which passed Poyning's Law, a statute which affected the whole subsequent course of Irish political and constitutional history, met respectively at Kilkenny and Drogheda and not in the metropolis of Ireland. Drogheda, indeed, seems to have been a favourite place for the meetings of Parliament. From the time of Elizabeth, however, all subsequent Parliaments were convened in Dublin, with the exception of Cromwell's Parliament, if it may be designated by the name of Parliament, which was summoned to meet in Westminster for the three Kingdoms, the numbers allotted to Scotland being



thirty and to Ireland thirty. The provision placing in the discretion of Parliament itself the place to be selected for its meeting, and the provisions in the 24th Article in reference to the fixing of the date of the re-assembly of Parliament and the date of the conclusion of the session of each House—in other words, of the prorogation—are complete innovations on constitutional practice, and seem to be limitations of the prerogative of the Crown. “A prorogation,” writes Blackstone, “is the continuance of the Parliament from one session to another; this is done by royal authority when expressed either by writ of prorogation or by the Lord Chancellor in the presence of or by commission from the Crown or else by proclamation.” The Article provides that the Parliament shall be summoned and dissolved by the representative of the Crown in the name of the King, and subject as aforesaid, Dáil Eireann shall fix the date of re-assembly of the Parliament, and the date of the conclusion of the session of each House provided that the session of the Senate shall not be concluded without its own consent.”

#### Article 14.

*All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex, who have reached the age of twenty-one years and who comply with*

*the provisions of the prevailing electoral laws, shall have the right to vote for members of Dáil Eireann, and to take part in the Referendum and Initiative. All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex who have reached the age of thirty years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Seanad Eireann. No voter may exercise more than one vote at an election to either House and the voting shall be by secret ballot. The mode and place of exercising this right shall be determined by law.*

Article 3 defines the class of persons who are citizens of the Irish Free State, and as such enjoy the privileges and are subject to the obligations of such citizenship.

“Compliance with the provisions of the prevailing electoral laws” will probably include the absence of the grounds upon which persons may be disqualified from voting. Aliens, persons of unsound mind in receipt of parochial relief, or convicted of certain offences are incapable of voting. Every person sentenced to death, to penal servitude, or to any term of imprisonment with hard labour, or exceeding twelve months, becomes incapable of exercising any right of suffrage or other Parliamentary or municipal franchise whatever. Such incapacity continues until such person

has suffered the punishment to which he has been sentenced, or such other punishment as by competent authority may be substituted for the same, or until he receives a free pardon. (33 & 34 Vic., c. 23 s. (2).

The circumstances and conditions of participation in the Referendum and Initiative are set forth in Articles 50 and 48 respectively. The great value of the principle secured by this Article—that no voter may exercise more than one vote at an election to either House—may be illustrated by a passage from a speech delivered by Mr. John Bright in Yorkshire, in September, 1883. "We saw," he said, "the other day a statement in the papers of a reverend gentleman at Oxford, I think he stated he had twenty-four qualifications for voting. He had actually been so active and so energetic and so patriotic in his mistaken views that he had polled at one general election no less than seventeen times. I am against disfranchising anybody, but I should have no reluctance in voting that he should be shut off from twenty-three of these qualifications."

#### **Article 15.**

*Every citizen who has reached the age of twenty-one years and who is not placed under disability or*

*incapacity by the Constitution or by law shall be eligible to become a member of Dáil Eireann.*

Article 73 provides: "Subject to this Constitution, and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed and amended by enactment of the Oireachtas." The prescribed legal disqualifications for sitting and voting in Parliament at the date of the coming into operation of the Irish Constitution were infancy, lunacy, or idiocy; being an alien, a holder of office under the Crown, a judge, sheriff of a county; or a returning officer of a city or borough, or member for the county, of which he is sheriff, or for the city or borough of which he is returning officer; a Government contractor continuing a bankrupt for a year; being attainted and adjudged guilty of treason and felony without having received a pardon or served his term of punishment. These are the chief but not the only grounds of disqualification for sitting, as for instance at an election a person may be disqualified for being elected by reason of corrupt practices committed at an election.

In one notable instance the law in respect to disqualification of members on acceptance of office

under the Crown has been altered as being inconsistent with the Constitution. The Place Act vacated the seat of a member of the British House of Commons who accepted place under the Crown, although in certain cases the member whose seat was thus vacated was eligible for re-election. A statute of 1918 suspends the operation of the Place Act for the nine months immediately succeeding the meeting of a new Parliament, but the doctrine of the vacating of a seat in the British House of Commons is still maintained, notwithstanding this modification. Under the provisions of Article 52 of the Irish Constitution the Ministers who form the Executive Council, so far from vacating their seats on appointment to offices of profit under the Crown shall be all members of Dáil Eireann as an essential condition precedent to their appointment. Article 69 provides that a judge shall not be a member of the Oireachtas—a member of either House—whereas although judges were ineligible to the House of Commons, the House of Lords has been described as theoretically a House of Judges. Again, women could not exercise the Parliamentary franchise who were under thirty years of age, whereas the age at which the Parliamentary franchise can be exercised has been fixed by this Article and the preceding article without distinction of sex.

**Article 16.**

*No person may be at the same time a member both of Dáil Eireann and of Seanad Eireann, and if any person who is already a member of either House is elected to be a member of the other House, he shall forthwith be deemed to have vacated his first seat.*

Under the provisions of Article 57 every Minister shall have the right to attend and be heard at the Seanad Eireann, and under the provisions of Article 52 the Ministers who form the Executive Council shall all be members of Dáil Eireann.

**Article 17.**

*The oath to be taken by members of the Oireachtas shall be in the following form :*

*I.....do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established, and that I will be faithful to H. M. King George V, his heirs and successors by law in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.*

*Such oath shall be taken and subscribed by every member of the Oireachtas before taking his seat therein before the representative of the Crown or some person authorised by him.*

The Irish Parliamentary oath embodied in the Treaty and the Constitution shall, according to Article 17 of the Constitution, be taken and subscribed by every member of the Parliament before taking his seat therein. The oath in the British Parliament, in the House of Commons, is not taken till after the election of a Speaker, who is the only regular chairman over the deliberations of the House of Commons and its sole representative to the outer world. While the chair of the Speaker is unfilled it may be said that the functions of the House of Commons are in abeyance. Other officers, who under certain circumstances take his place in the Chair, possess only an authority derived from and exercisable in the event of his inability to act. When a Speaker who has been elected at the commencement of a session, on returning to the House of Commons from the House of Lords, announces to the House his approval by the King, he puts the House in mind of the fact that the first thing to be done is to take and subscribe the oath; and he himself, standing upon the upper step of the chair, takes and subscribes the oath accordingly, in which ceremonies he is followed by other members who

are present. The oath must, under Sec. 3 of the Parliamentary Oaths Act, 1866, be taken whilst a full House of Commons is sitting with the Speaker in the chair. In the House of Lords the Lord Chancellor first takes and subscribes the oath. The penalties for omission to take the oath and for sitting and voting in the House of Lords, and for sitting and voting in the House of Commons after the election of a Speaker, are heavy, and in the House of Commons render the seat of the offending member vacant. The oaths are administered in the House of Lords by the Clerk of Parliaments, and in the House of Commons by the Clerk of that House. In the Irish Parliament the oath is to be taken and subscribed before "the representative of the Crown or some person authorised by him." It must be taken by members of the Senate and by members of the Chamber before the respective chairmen of these Houses are elected. No place has been specially assigned for the taking of the oath. In the British Parliament the oaths were formerly administered by the Lord Steward or his deputy not in the chambers of the Houses but in one of the rooms of Westminster Palace. From 1678, when there was added a declaration against transubstantiation, which had to be made at the table of the House with the Speaker in the chair, the taking of the oaths in the chambers of the respective Houses in England became the practice.



The Parliamentary oath is an institution of modern origin in Parliamentary history. The Parliaments of the Middle Ages asked no special oaths from their members as a legal preliminary to the fulfilment of their duties. The introduction of this requirement is wholly due to the politico-religious conflicts of the sixteenth century. The first oath imposed on members of the English House of Commons was instituted in 1563 by Queen Elizabeth's Act of Supremacy (5 Eliz., c. 1). In the Irish Parliaments there was no religious disqualification from Henry VIII till Charles II. A Bill to make the oath of Supremacy compulsory on members in 1663 failed to pass in the Irish Parliaments. The position remained unchanged till after the Revolution, when an Act passed by the English Parliament for Ireland in 1691 (3 Will. & M., c. 2, *English Statutes*), rendered Roman Catholics incapable of serving in the Irish Parliaments as it required persons serving in that Parliament to take the oaths of allegiance and supremacy and make the declaration against transubstantiation under regulations similar to those enforced in England.

It should be noticed that all the express disabilities created by the form of the Parliamentary oath in days gone by have been imposed for political purposes, and so far as they were directed—as they mainly were directed—at Roman Catholics their

object was to exclude from Parliament such persons who were presumed to be hostile to the reigning Sovereign, because they desired to see a Roman Catholic on the Throne, or because they recognised behind the Throne the supreme authority of the Pope. (See Anson's *Law and Custom of the Constitution*, I. Parliament, p. 93.)

#### Article 18.

*Every member of the Oireachtas shall, except in case of treason, felony, or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not, in respect of any utterance in either House, be amenable to any action or proceeding in any Court other than the House itself.*

Just as the election of a Chairman of the Senate or of the Chamber is complete without the formal approval of the Crown (see Article 21), so, too, neither the Senate nor the Chamber goes through the form of asking the Crown for its privileges.

This Article provides that every member of the Parliament shall be privileged from arrest except in the case of treason, felony, and breach of the peace, in going to and returning from and within the precincts of either House. This freedom from

arrest was claimed by a resolution of the English House of Commons of the 20th May, 1675, in similar words: "That by the laws and usage of Parliament, privilege of Parliament belongs to every member of the House of Commons in all cases except treason, felony, and breach of the peace." Since *Wilkes'* case, however, when it was decided that freedom from arrest for misdemeanour could not be claimed as a Parliamentary privilege, it has been considered, according to the report of the Committee of Privileges in 1831, "established generally that privilege is not claimable for any indictable offence." One case will be sufficient to show how little protection is practically afforded by privilege in criminal cases. In 1815 Lord Cochrane, a member, having been indicted and convicted of a conspiracy (which is not a felony but a misdemeanour), was arrested by the marshal whilst he was sitting on the Privy Councillor's Bench in the House of Commons on the right hand of the chair at which time there was no member present, prayers not having been read. The case was referred to the Committee of Privileges, who reported that it was entirely of a novel character and that the privileges of Parliament did not appear to have been violated so as to call for any interposition of this House against the Marshal of the King's Bench (see May's *Parliamentary Practice*, p. 116). No doubt a similar

course under similar circumstances would be taken by the Irish Senate or the Irish Chamber of Deputies.

**Article 19.**

*All official reports and publications of the Oireachtas or of either House thereof shall be privileged, and utterances made in either House wherever published shall be privileged.*

This Article and Article 25 provide that all reports and publications of the Parliament or of either House thereof shall be privileged, and that the sittings of each House of the Parliament shall be public, though in cases of special emergency, either House may hold a private sitting with the assent of two-thirds of the members present. These articles are of interest as departures from rules of the British Parliament which while still in existence and capable of being enforced, should occasion arise for such enforcement, are not merely disregarded but would, if they were observed, produce results which both Houses would be most anxious to avoid. The publication of the debates of either House of the British Parliament has been repeatedly declared to be a breach of privilege, and especially false and perverted reports of Parliamentary

proceedings. No doubt can exist that if either House desires to withhold those proceedings from the public it is within the strictest limits of their jurisdiction to do so, and to prevent any violation of their orders. Repeated orders have been made forbidding the publication of the debates and proceedings of the Houses, although debates are cited in the British Parliament from printed reports; galleries are constructed for the accommodation of reporters, and grants are annually voted to further the publication of debates. When a wilful misrepresentation of a debate arises the House censures the offender, the ground of complaint being the incorrect report, but the motion for the punishment of the printer assumes that the publication of the debates at all is a breach of privilege. The principle, however, by which both Houses are governed is now sufficiently acknowledged. So long as the debates are correctly and faithfully reported the privilege which prohibits their publication is waived. By orders of both Houses strangers are not supposed to be admitted while the Houses are sitting. The Lords' Standing Order No. 8 prescribes that no person shall be in any part of the House during the sitting of the House except Lords of Parliament and Peers of the United Kingdom not being members of the House of Commons or heirs apparent of peers or

peeresses of the United Kingdom in their own right and the attendants of the House. Strangers, however, are regularly admitted below the Bar and in the galleries, but the standing order may at any time be enforced. (See May's *Parliamentary Practice*, pp. 205-207). Until 1845 the House of Commons by a sessional order, maintained the exclusion of strangers from every part of the House, but since that time the order has not been made and the presence of strangers has been recognised in those parts of the House not appropriated to the use of members. According to ancient usage the exclusion of strangers could at any time be enforced without an order of the House, for, on a member taking notice of those persons the Speaker was obliged to order them to withdraw without putting a question. The inconvenience of this rule prompted the House to agree to a resolution on the 31st May, 1875, now Standing Order No. 91, which provides that if notice be taken that strangers are present the Speaker or the chairman should forthwith put the question that strangers be ordered to withdraw, reserving to the Speaker or chairman, whenever he thinks fit, to order the withdrawal of strangers from any part of the House.

Article 19 of the Irish Constitution is of interest inasmuch as the protection of Parliamentary privilege seems to be extended more fully than in Great Britain to reports and publications of Parlia-

mentary proceedings. The Article provides that "all official reports and publications of the Parliament or of either House thereof shall be privileged, and utterances made in either House wherever published shall be privileged." In Great Britain information printed merely for the use of members of Parliament and circulated amongst them is privileged, but writings containing defamatory matter, though printed for the use of members, cannot lawfully be circulated amongst those who are not members of Parliament. To give an illustration. Messrs. Hansard, the printers of the House of Commons, had printed by order of that House the reports of the inspectors of prisons, in one of which a book published by John Joseph Stockdale was described in a manner which he conceived to be libellous. He brought an action against Messrs. Hansard during the Parliamentary recess in 1836, who pleaded the general issue and produced the order of the House to print the report. This order was held to be no defence to the action, and Lord Chief Justice Denman, who tried the action, made a declaration adverse to the privilege of the House which Messrs. Hansard had set up as part of their defence. In his direction to the jury Lord Denman said "that the fact of the House of Commons having directed Messrs. Hansard to publish all their Parliamentary reports is no justification for them or for any bookseller who publishes a Parliamentary report

containing a libel against any man." (*Stockdale v. Hansard*, 9 Ad. & E., p. 1). Protection was eventually obtained for the publication of Parliamentary papers by statute, 3 & 4 Vic., c. 9, by which it is enacted that proceedings, criminal or civil, against persons for the publication of papers printed by order of either House of Parliament, shall be immediately stayed on the production of a certificate verified by affidavit to the effect that such publication is by order of either House. Proceedings are also to be stayed, under the statute, on the publication of a copy of a Parliamentary paper upon the verification of the correctness of such copy; and in proceedings commenced for printing any extract from or abstract of a Parliamentary report or paper the defendant may give the report in evidence under ✓ the general issue, and prove that his own extracts or abstracts were published *bonâ fide* and without malice, and if such shall be the opinion of the jury a verdict of "not guilty" will be entered. Under the provisions of the Irish Constitution reports and publications of the Parliament or of either House thereof are *ab initio* privileged and wholly unaffected by the judgment of Lord Chief Justice Denman and by the legislation subsequently passed for the purpose of bringing that judgment into harmony with the doctrine of Parliamentary privilege as held by the Houses of Parliament themselves. Then, again, the provision in Article 19 that "utterances



made in either House wherever published are privileged," seems to be of wider application than the privilege by which, in Great Britain, the publication of speeches in Parliament is protected. In Great Britain, if a member should say nothing disrespectful to the House or the chair, or personally opprobrious to other members or in violation of other rules of the House, he may state whatever he thinks fit in debate and is protected by his privilege from any action for libel as well as from any other form of molestation. But if a member should publish his speech his printed statement becomes a separate publication unconnected with any proceedings in Parliament; whereas it is presumed a speech delivered in the Irish Parliament and similarly published would seem to be in the class of "utterances made in either House which wherever published shall be privileged." That privilege in Great Britain does not extend to speeches in Parliament separately published is established by two remarkable cases. In 1795 an information was filed against Lord Abingdon for a libel. He had accused his attorney of improper professional conduct in a speech delivered in the House of Lords which he afterwards published in several newspapers at his own expense. Lord Abingdon pleaded his own cause in the Court of King's Bench, and contended that he had a right to print what he had by the law of Parliament a right to speak; but Lord Kenyon

said that "a member of Parliament had certainly a right to publish his speech, but that speech should not be made a vehicle of slander against any individual; if it was, it was a libel." The court gave judgment that Lord Abingdon should be imprisoned for three months, pay a fine of £100, and find security for his good behaviour: (1 *Esp. N.P.C.*, p. 228). In 1813 Mr. Creevey had made a charge against an individual in the House of Commons, and incorrect reports of his speech having appeared in the Press, sent a correct report of that speech to the Press with a request for its publication. Upon an information filed against him the jury found him guilty of libel, and the King's Bench refused an application for a new trial. Mr. Creevey, who had been fined £100, complained to the House of Commons of the proceedings of the King's Bench, but the House refused to admit that they were a breach of privilege: (68 *Commons Journals*, p. 707: see Lord Ellenborough's judgment, 1 M. & S., p. 278). Sir Alexander Cockburn, moreover, as Lord Chief Justice, laid it down in *Wason v. Walter* (L. R. 4 Q. B., p. 89), that "if a member publishes his own speech reflecting upon the character of another person and omits to publish the rest of the debate the publication would not be fair and so would not be privileged, but that a fair and faithful report of the whole debate would not be actionable."

**Article 20.**

*Each House shall make its own Rules and Standing Orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.*

In the House of Lords, in the Constitution of Great Britain, privileges are not demanded. In the House of Commons privileges are claimed from the Crown at the commencement of every Parliament by the Speaker addressing the Lord Chancellor on behalf of the Commons. They are claimed as "ancient and undoubted," and are, through the Chancellor, "most readily granted and confirmed" by the Crown. The House of Commons asks for three things: freedom of the person, freedom of speech, and certain rights of a merely formal character. Freedom from arrest and freedom of speech in the House of Lords are as absolutely the privileges of the members of that House as they are the privileges of the members of the House of Commons. Under the provisions of the Irish Constitution, Articles 18 and 19, freedom from arrest and freedom of speech in Parliament are

absolutely secured, and under Article 20 the right of the Senate and the Chamber to regulate and control their own proceedings and to maintain their own dignity by the punishments of affronts thereto, whether offered by members of those Houses or by strangers, are likewise secured. The Article is in itself a corollary of the great provision of the Bill of Rights (1 Will. & M. s. 2, c. 2), that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." The power with which the Senate and the Chamber are invested, exclusively of regulating their own procedure and adjudging matters that arise within their walls, must be accompanied with the power of enforcing their privileges in these respects and of punishing those who infringe them. The power conferred on the Senate and the Chamber to attach penalties for the infringement of their rules and orders irresistibly suggests the question: What will be the nature of these penalties? In the Parliament of Great Britain offenders against its rules are punished by censure, or commitment, or fine, in the same manner as Courts of Justice punish for contempt. Both Houses have agreed in their adjudication of breaches of privilege, but in several important particulars there is a difference in their modes of punishment. The Lords have claimed to be a court of record, and as such not only to imprison

but to impose fines. They also imprison for a fixed time and order security to be given for good conduct, and their customary form of commitment is by attachment. The Commons, on the other hand, commit for no specified period, and during the last two centuries have not imposed fines. The Lords have power to commit for a term even beyond the duration of a session, whereas the prisoners committed by the House of Commons, if not sooner discharged by the House, are immediately released from their confinement on a prorogation. If they were longer held in custody they would be discharged by the courts upon a writ of *habeas corpus*.

#### **Article 21.**

*Each House shall elect its own Chairman and Deputy Chairman and shall prescribe their powers, duties, remuneration, and terms of office.*

The contrast between the position of Speaker and Deputy-Speaker of the House of Lords of the British Parliament and the Chairman and Deputy-Chairman of the Senate of the Irish Parliament is remarkable. In the British Parliament the Speaker of the House of Lords is by prescription the Lord Chancellor or Lord Keeper, who need not necessarily be a peer and therefore need not necessarily be a

member of the House. He is, moreover, *virtute officii*, a Minister of the Crown appointed not by the House of Lords but by the Crown. At times there are Deputy-Speakers appointed by Royal Commission to officiate as Speakers of the House of Lords during the absence of the Lord Chancellor or Lord Keeper. Those Deputy-Speakers are not necessarily members of the House of Lords. When the Great Seal has been in commission it was usual for the Crown to appoint the Lord Chief Justice or some other high judicial personage, if a peer, to be Lord Speaker; but in 1827 the Master of the Rolls and the Chief Baron of the Court of Exchequer, and in 1835 the Vice-Chancellor of the day, were appointed, although not peers, Lord Speakers while the Great Seal was in commission. When the Lord Chancellor and all the Deputy-Speakers are absent at the same time the Lords elect a Speaker *pro tempore*, but he gives place immediately to any of the Lords Commissioners on their arrival in the House. The position of the Speaker of the House of Lords is somewhat anomalous, for although he is President of a deliberative assembly he is invested with no more authority than any other member. The Chairman of the Irish Senate, on the contrary, must be at the time of his election a member of that body, and the same condition precedent to his election applies to the Vice-Chairman. Those officials are appointed neither directly nor indirectly

by the Crown but exclusively by the votes of the Senate. Their tenure of office moreover depends not on the pleasure of the Crown, but is prescribed with their powers and duties by the Senate itself; and those powers and duties in relation to the Senate itself are far greater than the powers and duties of the Lord Chancellor or the Lord Keeper in relation to the House of Lords. This great departure from the uniform practice of the British Constitution, by which the Lord Chancellor or the Lord Keeper is *ex officio* Speaker of the House of Lords—whereas the Chairman of the Irish Senate, like the Speaker of the Senate of the Parliament of Northern Ireland, is the holder of an office wholly unconnected with the Crown—has, strange to say, a precedent in the history of the old Irish Parliament. In 1661, in the first session of the Irish Parliament after the Restoration, Archbishop Bramhall, the Irish Lord Primate, was Speaker of the Irish House of Lords. The reason assigned for the filling of the office in this manner was the appointment of Sir Maurice Eustace, the Lord Chancellor, to be one of the Lords Justices for the administration of the government of the country in the absence from Ireland of the Lord Lieutenant.

The differences and distinctions, moreover, between the offices of Chairman and Deputy-Chairman of the Chamber of Deputies and the office of Speaker and Deputy-Speaker of the

British House of Commons are very marked. In the Irish Chamber and the British House alike the presidents or vice-presidents must, as a condition precedent to their appointment, be members of the respective bodies over which they are to preside. The election, however, of a Chairman of the Irish Chamber is made on the initiative of that Chamber and is complete and absolute at the moment of his selection by the vote or the unanimous call of the Chamber to the Chair; whereas the election of a Speaker of the House of Commons is not made on the initiative of that House but in pursuance of a communication from the Crown requiring "the House to proceed to the election of some proper person to be their Speaker," and the subsequent approval (which has never been withheld since 1678) of the Speaker-elect by the Crown. Again, the election of Deputy-Chairman of the Irish Chamber is like the election of the Chairman on the initiative of the Chamber itself, and is completely independent of the approval of the Crown, while the position of the Deputy-Chairman is unaffected by any vacancy owing to death, resignation or removal of the occupant of the Chair. The position of Deputy-Chairman of the Irish Chamber differs widely from the position of Deputy-Speaker of the House of Commons. The Deputy-Speaker of the House of Commons is not directly elected to that position, which he holds by virtue of his office of Chairman



of Ways and Means. At the beginning of a new Parliament, when the House of Commons resolves itself for the first time into the Committee of Supply, the Leader of the House or a Minister of the Crown on his behalf calls upon a member to take the Chair of that committee. If difference should arise in that Committee concerning the election of a Chairman the matter must be determined by the House itself. The Speaker at once resumes the Chair and a motion being made "That Mr. — do take the Chair of the Committee," the Speaker puts the question which, being agreed to, the Mace is again removed from the table, and the House resolves itself into Committee. On some very recent occasions the Chairman has been appointed by resolution. The Chairman so appointed presides over that committee and over the Committee of Supply for the remainder of the Parliament. He also acts as Deputy-Speaker. Formerly no provision was made for supplying the place of the Speaker by a Deputy-Speaker or Speaker *pro tempore*, as in the House of Lords, and when the Speaker of the House of Commons was unavoidably absent no business could be transacted, but the Clerk acquainted the House with the reason of his absence and put the question for adjournment. When the Speaker, by illness, was unable to attend for a considerable time, it was necessary to elect another Speaker with the usual formalities of

permission from the Crown and the royal approval. On the recovery of the former Speaker the new Speaker would resign or "fall sick," and the former Speaker was re-elected with a repetition of the same ceremonies. In 1855, on the report of a Select Committee, a Standing Order No. 81 was agreed to which enables the Chairman of Ways and Means to take the Chair during the unavoidable absence of the Speaker and perform his duties. The provisions of this Standing Order received statutory authority by 18 and 19 Vic., c. 84. But the great distinction between the office of Deputy-Speaker of the House of Commons and Deputy-Chairman of the Irish Chamber of Deputies is that the powers of a Deputy-Chairman are in full activity not only during the unavoidable absence of the Chairman from the Chair but during a vacancy in the office of Chairman, whereas a vacancy in the office of Speaker places *ipso facto* all the functions of the House of Commons in abeyance till the Chair is filled by the election of a successor. The Speaker of the British House of Commons regularly takes the Chair at all meetings of the House strictly so called. Only at his request and if and so far as he feels himself unable to preside have his substitutes any right or duty to take his place in the Chair. The British House of Commons has not any presidential college, and therefore there are no Vice-Presidents or Vice-Chairmen who support the Chair.

**Article 22.**

*All matters in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present other than the Chairman or presiding member, who shall have and exercise a casting vote in the case of an equality of votes. The number of members necessary to constitute a meeting of either House for the exercise of its powers shall be determined by its Standing Orders.*

An acute critic in the lay Press writes of the Irish Constitution : " The Constitution of the Irish Free State in its present form sets up democracy, in other words, the rule of a majority of one, on a pedestal from which it will be dislodged with difficulty." If this estimate be accurate it is capable of vindication, as, in consonance with the practice of the British Constitution in its normal working. That practice was, before the introduction of rules of procedure of comparatively recent origin, expounded and explained by Mr. Gladstone. In advocating, in 1882, the first of his Procedure Resolutions of that year, which provided the closure of debate on the vote of a bare majority,—the rule of a majority of one—Mr. Gladstone said : " There is but one sound principle in this House and that is that the majority of the House shall prevail. The whole of our

proceedings are founded upon it, and what consequences have followed? A majority of five threw out the Melbourne Government in 1839, a majority of five threw out Lord John (Earl) Russell's Government in 1866, a majority of three threw out the Government of which I had the honour to be the head in 1873, a majority of two brought in the Public Education Act, a majority of one threw out the Government of Lord Melbourne, or at least caused the dissolution of Parliament in 1841. A majority of one carried the Reform Bill of 1832, when, if that majority had been the other way, unquestionably, whatever Bill was passed, would have been of an entirely different character. A revolution even more important was that brought forward by Mr. Pitt in the Act of Union in 1799. An amendment adverse to that Act was proposed—105 voted for the amendment and 106 voted for the Act of Union, and thus, by a majority of one, was carried one of the largest, most important, and most remarkable changes ever effected by a legislative body." A more accurate estimate of the Irish Constitution would render the words of Mr. Beck, the Solicitor-General of the United States, in his exposition of the Constitution of the United States, applicable to the Irish Constitution. Mr. Beck, in the third of his series of lectures delivered in Gray's Inn Hall dealing with the United States Constitution, said that in that great instru-

ment there are "many striking negations of majority rule." "The American people," Mr. Beck declared, "distrustful as they were of the new Constitution, had the political sagacity to prefer its imperfections, whatever they imagined them to be, to the mad spirit of innovation; and in order that the Constitution should not, through the excesses of party passion or the temporary caprice of fleeting generations, become 'a mere scrap of paper,' they very wisely provided that no amendment (of the Constitution) should in the future be made unless it was proposed by at least two-thirds of the Senate and the House of Representatives, and ratified by three-fourths of the States through their Legislatures or through special Conventions." Under the provisions of the Irish Constitution, amendments of the Constitution are more strictly guarded. Amendments of the Constitution may no doubt be made by the Parliament, after the expiration of a period of eight years from the date of the coming into operation of the Constitution; but these amendments must be within the terms of the scheduled treaty, and must be submitted to a Referendum of the people, and shall not be passed unless a majority (not of the persons who record their votes, but) of the voters on the register record their votes, and either a majority of the voters on the register or two-thirds of the votes recorded are in favour of the amendment

(Article 50). The Irish Constitution may, without exaggeration, be said to abound with "negations of majority rule." To take a few illustrations of the rights of minority and of the power vested in minorities of delaying legislation with a view to its further consideration. Article 22 is restricted by many provisions, such as the provision embodied in Article 25, which enables either House, in case of emergency, to hold a private sitting with the consent, not of the majority, but of two-thirds of the members present. It is, moreover, in the power of a minority in either House to suspend Bills passed by both Houses with a view to the submission of such Bills to a Referendum. "Any Bill," it is provided by Article 47, "passed or deemed to have been passed by both Houses may be suspended for a period of ninety days on the written demand of two-fifths of the members of the Chamber, or of a majority of the members of the Senate, presented to the President of the Executive Council not less than seven days from the day on which such Bill shall have been so passed, or deemed to have been so passed. Such a Bill shall be submitted by Referendum to the will of the people, if demanded before the expiration of the ninety days, either by a resolution of the Senate assented to by three-fifths of the members of the Senate or by a petition signed by not less than one-twentieth of the voters then on the

register of voters, and the decision of the people on such referendum shall be conclusive. These provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health, or safety." When, moreover, it is remembered that the Senate is elected from a panel of individuals not selected by the popular vote, and that the power of the initiation by the people of proposals for laws or constitutional amendments under Article 48 is exercisable by a minority of the electorate, a description of the Irish Constitution as "a setting up of the rule of a majority of one" is purely fantastic. The Irish Constitution is, on the contrary, a system of checks and balances devised and arranged with an extraordinary ingenuity. "In the articles of the Irish Constitution," to use the words of the *Times*, "conservatism appears in democratic garb."

### **Article 23.**

*The Oireachtas shall make provision for the payment of its members and may in addition provide them with free travelling facilities in any part of Ireland.*

In the earlier history of the Irish as of the English Parliaments members of the House of Commons

were paid wages for their attendance and services in Parliament. The old system of the payment of members differed from the system of payment established in 1911 in the British House of Commons. In times gone by the charge was entailed on local funds, the members being paid by their constituents, whereas the charge now falls not on local but on Imperial funds. The payment, however, was confined to members of the House of Commons, and in no case in either country were members of the House of Lords paid for their services. The article of the Irish Constitution enables the Irish Parliament, if it thinks fit so to do, to make provision for the payment of the members of both Houses. There was no provision in either Parliament for the payment of the travelling expenses of members ; and a proposal, in 1921, of the Government of Great Britain that the travelling expenses of members of the House of Commons should be defrayed from the public funds was vehemently and successfully resisted owing to the pressure of public opinion from without. In England and in Ireland, under the old system of payments of members of the House of Commons, what may be regarded as an equivalent to the payment of travelling expenses was the allowance of a certain number of days' pay for the journey to and fro between their homes and the place of meeting of Parliament. In England in the time of



Edward III, the wages of members of the House of Commons became fixed at 4s. a day for a knight of the shire, and 2s. a day for a citizen or burgess, and continued at that rate. In Ireland the wages of members of the House of Commons were higher than in England. In the time of Elizabeth, according to Hooker, knights of the shire were paid 13s. 4d. a day, the payment being subsequently reduced to 4s. a day, while burgesses were paid 5s. a day—the payment being subsequently reduced to 3s. 4d. a day. Allowance, moreover, was given from the first day of the journey towards Parliament, the distance to be traversed in a day being twenty miles in winter and thirty miles in summer. (Montmorency's *Irish Parliament*, p. 95). In the Parliament of James I, in 1613, the wages of the members of the House of Commons were fixed at 13s. 4d. a day for knights of the shire, 10s. a day for citizens, 6s. 8d. a day for burgesses, with an allowance of ten days' pay before the meeting of Parliament and the same allowance after a prorogation. The abolition of the payment of wages to members of the House of Commons may be traced in Ireland, as in England, to the enfranchisement of small boroughs, whose members, so far from being anxious to obtain wages for services in Parliament, were eager to buy seats in the House of Commons by which to enrich themselves by the methods of Parliamentary corruption then in

vogue. In March, 1665, an order was made by the Irish House of Commons stating that many inconveniences had arisen from the collection of wages, and that no warrants should issue for any wages due since September, 1662, or that should be due thereafter. This was the last time that wages were allowed in Ireland, but the statute by which wages were paid was never repealed. In England the payment of members of the House of Commons ceased almost at the same time as in Ireland. In March, 1676, a Bill for the abolition of payment of members, introduced by Sir Harbottle Grimstone, produced an animated debate. It was read a second time and was silently dropped. It was, however, virtually admitted in debate that the practice of the payment of members was a thing of the past. Andrew Marvell, who sat in that House of Commons, was one of the last of the members who were paid wages by their constituents. The Statute of Wages was, however, never repealed, and Lord Chancellor Campbell in 1844 expressed the opinion that wages might still be claimed by members of the House of Commons for their services.

#### **Article 24.**

*The Oireachtas shall hold at least one session each year. The Oireachtas shall be summoned and*

*dissolved by the Representative of the Crown in the name of the King, and subject as aforesaid Dáil Eireann shall fix the date of re-assembly of the Oireachtas and the date of the conclusion of the session of each House : Provided that the sessions of Seanad Eireann shall not be concluded without its own consent.*

The rule that Parliament shall hold at least one session each year is embodied by this Article in the Constitution. In England an Act of Charles II (16 Char. II, c. 1), which provided that the sitting and holding of Parliament shall not be intermitted or discontinued above three years at the most was repealed by the Statute Law Revision Act, 1887. A statute of William and Mary (6 Wm. & M., c. 2) still in force provides that Parliament shall sit at least once in every three years. The observance of the rule of a yearly Parliamentary session is secured in Great Britain only by the necessity of appropriating supplies, and of providing for the discipline of the Army generally. The provision in the Article vests the power in the Dáil, after the Oireachtas has been summoned by the Representative of the Crown in the name of the King, of fixing the date of the re-assembly of the Oireachtas and the date of the conclusion of the session of each House (provided that the Sessions of the Senate shall not be concluded without its

own consent). Article 36 provides that "Dáil Eireann shall, as soon as possible after the commencement of each financial year, consider the estimates of receipts and expenditure of the Irish Free State for that year, and save in so far as may be provided by specific enactment in each case the legislation required to give effect to the financial resolution of each year shall be executed within the year." Either of these provisions would in themselves render a meeting of Parliament every year absolutely necessary. "It is sometimes said," writes Sir William Anson, "that the necessities of supply compel the Crown to an annual summons of Parliament. But much of our taxation is now permanent and Government might fairly be carried on for a while without these annual taxes which every session increases or diminishes. It is not the need of supply, but of the appropriation of supply, and of the Army Act which renders it legally necessary for Parliament to sit every year. If Parliament did not appropriate the supplies of the year to specific purposes, the money which is provided by taxation could not legally be paid out to meet the services of the year, except in the case of those charges upon the revenue as are permanently authorised by statute." (*Law and Custom of the Constitution*, I. Parliament, p. 303). "Statutory provisions," writes Sir Erskine May, "must be made by Parliament during each

financial year, to ensure that all the money raised for the service of the Crown be applied to a distinct use either wholly or partly within the year, as the proceeds of taxation should not be reserved for accumulation pending the decision of Parliament, or otherwise left without specific appropriation.” (May’s *Parliamentary Practice*, pp. 590-591).

The dissolution of the Oireachtas, which may be regarded as a dissolution of the Dáil, shall not be effected under the provisions of Article 53 on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Éireann. The Dáil moreover may not at any time be dissolved under the provisions of Article 28, except on the advice of an Executive Council.

#### **Article 25.**

*Sittings of each House of the Oireachtas shall be public. In cases of special emergency either House may hold a private sitting with the assent of two-thirds of the members present.*

See notes on Article 19 with reference to majority rule. See also notes in Article 22 with reference to the exceptions to the rule of the determination of matters in each House by a majority of the votes of the members present.

**Article 26.**

*Dáil Eireann shall be composed of members who represent constituencies determined by law. The number of members shall be fixed from time to time by the Oireachtas, but the total number of members of Dáil Eireann (exclusive of members for the Universities) shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population: Provided that the proportion between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as possible, be identical throughout the country. The members shall be elected upon principles of Proportional Representation. The Oireachtas shall revise the constituencies at least once in every ten years, with due regard to changes in distribution of the population, but any alterations in the constituencies shall not take effect during the life of Dáil Eireann sitting when such revision is made.*

**Article 27.**

*Each University in the Irish Free State (Saorstát Eireann), which was in existence at the*

*date of the coming into operation of this Constitution, shall be entitled to elect three representatives to Dáil Eireann upon a franchise and in a manner to be prescribed by law.*

### **Article 28.**

*At a General Election for Dáil Eireann the polls (exclusive of those for members for the Universities) shall be held on the same day throughout the country, and that day shall be a day not later than thirty days after the date of the dissolution and shall be proclaimed a public holiday. Dáil Eireann shall meet within one month of such day, and shall unless earlier dissolved continue for four years from the date of its first meeting, and not longer. Dáil Eireann may not at any time be dissolved except on the advice of the Executive Council.*

In Great Britain the existence of Parliament in modern times is kept as nearly continuous as possible, and hence the dissolution of one Parliament and the calling of another are effected by the same Royal Proclamation. The time between the proclamation calling a Parliament and its meeting may be any time not less than thirty-five days (15 and 16 Vict., c. 23), subject, however, to a

prorogation of the meeting of Parliament from the day to which it shall stand summoned to any further day not being less than fourteen days from the date of the proclamation (30 & 31 Vict., c. 81). In Great Britain accordingly, the interval between a dissolution and the assembling of the new Parliament varies according to the season of the year, the state of public business, and the political conditions under which an appeal to the people may have become necessary. Under the provisions of this Article the meeting of Dáil Eireann is imperative within one month of the day of a General Election for Dáil Eireann, and the meeting of the Senate will probably be fixed for the same day as that fixed for the meeting of the Dáil (see Article 24 in relation to the summoning of the Oireachtas). Article 24, as we have seen, places the date of the subsequent re-assembly of the Oireachtas and the condition of its sessions virtually within the discretion of the Dáil. The fixing of the beginning of the period of four years—the limit of the existence of the Dáil—at the date of its first meeting is in accordance with the precedents of the British Septennial Act, and of the British Parliament Act, 1911, by which the term of the statutory existence of Parliament thereby fixed commences from the day at which Parliament was appointed to meet. ✓



The provision that Dáil Eireann may not at any time be dissolved, except on the advice of the Executive Council, must be considered in conjunction with the provision of Article 24—that the Oireachtas shall be dissolved by the Representation of the Crown in the name of the King, and the provision of Article 53, that the Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Eireann. The effect of this provision in making the Dáil in reality the master not the servant of the Executive is explained in the preface of these notes, and is one of the most important features of the Constitution of the Irish Free State. The provision that the Dáil may not at any time be dissolved, except on the advice of the Executive Council, leaving out of consideration for the moment the case in which the Dáil cannot be dissolved on the advice of an Executive Council which has lost its confidence, renders of interest the following exposition and explanation of this principle by the late Sir Henry Jenkyns, K.C.B., who was for many years Parliamentary Counsel to the Treasury, and was unrivalled in his constitutional knowledge and Parliamentary experience. Writing more than a quarter of a century ago, Sir Henry Jenkyns said: “A question in which a Colonial Governor may frequently have to act independently of, or even contrary to, the advice

of his Ministers for the time being is that of the dissolution of the Colonial Legislature, or of that branch of it which is elected by the people. The constitutional rule is that the exercise of, or the refusal to exercise, the power of dissolution must be approved by a Minister of the Crown directly responsible to the popular branch of the Legislature. . . . Various cases have arisen in which a Governor has refused to grant a dissolution upon the advice of his Ministers ; these Ministers have, therefore, resigned, and new Ministers have been summoned who have carried on the Government. The principle to be gathered from these instances appears to be that constitutionally the discretion of the Governor is in every case unfettered, and that he is not bound by any precedent. Each case must be decided according to the circumstances. It is his duty to consider the question of dissolution in reference solely to the general interests of the people and not to the interests of the party in power, which he is under no obligation to sustain. He is therefore justified in withholding a dissolution requested by his Ministers, when he is of opinion that the object of the request is merely to strengthen their party and not to ascertain the public sentiment upon any disputed question of public policy. If he believes that a strong administration can be formed commanding the confidence of the existing legislature he is free,

instead of granting a dissolution to his Ministers, to accept the alternative of their resignation and try if such an administration may be formed." (Jenkyns' *British Rule and Jurisdiction Beyond the Seas*, pp. 111-113.) It would be difficult to exaggerate the effect of the provision in Article 53, in the securing of a Dáil Eireann who will control the Government (whose advice to the Governor-General to dissolve cannot be accepted if tendered by a defeated Government) instead of being controlled by it. In the Constitution of the Irish Free State while it is provided that Dáil Eireann may not at any time be dissolved except on the advice of an Executive Council (Article 28) it is also provided that the Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Eireann (Article 53). A penal dissolution is, under the Irish Constitution, an utter impossibility.

#### **Article 29.**

*In case of death, resignation or disqualification of a member of Dáil Eireann, the vacancy shall be filled by election in manner to be determined by law.*

A member of the Dáil Eireann, unlike a member of the House of Commons at Westminster, can

resign his seat without having recourse to the antiquated method of nominal appointment to a disqualifying office. It is a settled principle of English Parliamentary law that a member of the House of Commons after he has been duly chosen cannot relinquish his seat, and in order to evade this restriction a member who wishes to retire accepts nominal office under the Crown which legally vacates his seat and obliges the House of Commons to order a new writ. Such office is given ordinarily by the Treasury to any member who applies for it, unless there appears to be sufficient ground for its refusal. It is curious to note that it was not till 1740, five and thirty years after the passing of the English Place Act, that it was discovered that the acceptance of a small office was a means of vacating a seat. The provisions of the English Place Act were extended to Ireland in 1793. Before 1793 a seat in the Irish House of Commons could only be vacated by death, by being made a peer, or a judge, or by taking Holy Orders, but by no other means whatever save expulsion. A Bill was brought in to vacate the seats of members accepting offices under the Government created after the date of its enactment omitting the term *bonâ fide* offices, and by this means the Irish House of Commons was packed to carry the Union. According to the code of honour which then prevailed both in England

and Ireland members of nomination boroughs who were unwilling to vote as their patrons directed considered themselves bound to accept nominal offices, and thus vacate their seats which were at once filled by staunch Unionists. The Union, moreover, when first proposed in 1799 was virtually defeated. It was carried a few months afterwards in 1800, but in the interval between the defeat of the measure and its second introduction no less than 63 members of a House of Commons which numbered 300 members had vacated their seats by the acceptance of office—principally nominal office. "A Bill," said Mr. (Earl) Grey, speaking in the English House of Commons, in 1800, "formed for preserving the purity of Parliament was abused, and no less than 60 seats were vacated by their holders having received nominal office." The disqualifications for election to the Dáil Eireann, or for sitting and voting therein, have been stated in notes on Articles 15, 16, 17.

#### **Article 30.**

*Seanad Eireann shall be composed of citizens who shall be proposed on the grounds that they have done honour to the Nation by reason of useful public service or that, because of special qualifications or attainments, they represent important aspects of the Nation's life.*

**Article 31.**

*The number of members of Seanad Éireann shall be sixty. A citizen to be eligible for membership of Seanad Éireann must be a person eligible to become a member of Dáil Éireann, and must have reached the age of thirty-five years. Subject to any provision of the constitution of the first Seanad Éireann the term of office of a member of Seanad Éireann shall be twelve years.*

**Article 32.**

*One-fourth of the members of Seanad Éireann shall be elected every three years from a panel constituted as hereinafter mentioned at an election at which the area of the jurisdiction of the Irish Free State (Saorstát Éireann) shall form one electoral area, and the elections shall be held on principles of Proportional Representation.*

**Article 33.**

*Before each election of members of Seanad Éireann a panel shall be formed consisting of:—*

- (a) Three times as many qualified persons as there are members to be elected, of whom*

*two-thirds shall be nominated by Dáil Eireann voting according to principles of Proportional Representation, and one-third shall be nominated by Seanad Eireann voting according to principles of Proportional Representation; and*

- (b) *Such persons who have at any time been members of Seanad Eireann (including members about to retire) as signify by notice in writing addressed to the President of the Executive Council their desire to be included in the panel.*

*The method of proposal and selection for nomination shall be decided by Dáil Eireann and Seanad Eireann respectively, with special reference to the necessity for arranging for the representation of important interests and institutions in the country : Provided that each proposal shall be in writing and shall state the qualifications of the person proposed and that no person shall be proposed without his own consent. As soon as the panel has been formed a list of the names of the members of the panel arranged in alphabetical order with their qualifications shall be published.*

#### **Article 34.**

*In case of the death, resignation or disqualification of a member of Seanad Eireann his place*

*shall be filled by a vote of Seanad Eireann. Any member of Seanad Eireann so chosen shall retire from office at the conclusion of the three years period then running, and the vacancy thus created shall be additional to the places to be filled under Article 32 of this Constitution. The term of office of the members chosen at the election after the first fifteen elected shall conclude at the end of the period or periods at which the member or members of Seanad Eireann, by whose death or withdrawal the vacancy or vacancies was or were originally created, would be due to retire : Provided that the sixteenth member shall be deemed to have filled the vacancy first created in order of time and so on.*

**Article 35.**

*Dáil Eireann shall in relation to the subject matter of Money Bills as hereinafter defined have legislative authority exclusive of Seanad Eireann.*

*A Money Bill means a Bill which contains only provisions dealing with all or any of the following subjects—namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit*



of accounts of public money; the raising or guarantee of any loan or the repayment thereof; subordinate matters incidental to those subjects or any of them. In this definition the expressions "taxation," "public money" and "loan" respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.

*The Chairman of Dáil Éireann shall certify any Bill which in his opinion is a Money Bill to be a Money Bill, but, if within three days after a Bill has been passed by Dáil Éireann two-fifths of the members of either House by notice in writing addressed to the Chairman of the House of which they are members so require, the question whether the Bill is or is not a Money Bill shall be referred to a Committee of Privileges consisting of three members elected by each House with a Chairman who shall be the senior judge of the Supreme Court able and willing to act, and who, in the case of an equality of votes, but not otherwise, shall be entitled to vote. The decision of the Committee on the question shall be final and conclusive.*

The legislative authority, exclusive of the Senate, conferred under the provisions of this article on the Dáil in relation to the subject matter of Money Bills differs in some respects from the legislative authority of the House of Commons over

Money Bills, under the provisions of the Parliament Act, 1911 (1 & 2, Geo. V, c. 13). The decision of the chairman as to whether a Bill is a Money Bill which he has certified as such, may, at the instance of two-fifths of the members of either House, be referred to a Committee of Privileges composed of members of both Houses with a Judge of the Supreme Court, not, of course, a member of either House, with a vote in the case of an equality of votes ; whereas under the British Constitution, the Speaker of the House of Commons is the sole judge as to whether a Bill is or is not a Money Bill (although, no doubt, under the provisions of the Parliament Act, 1911, he shall consult, if practicable, two members to be appointed from the Chairman's panel), from whose decision there is no appeal. Again, in the British Constitution not a syllable of alteration of a Money Bill by the House of Lords is allowable, whereas in the Constitution of the Dáil, under the provisions of Article 38, it is provided that every Money Bill shall be sent to the Senate for its recommendation, and at a period not longer than twenty-one days after it shall have been sent to the Senate it shall be returned to the Dáil, which may pass it accepting or rejecting all or any of the recommendations of the Senate.

**Article 36.**

*Dáil Eireann shall as soon as possible after the commencement of each financial year consider the Estimates of receipts and expenditure of the Irish Free State (Saorstát Eireann) for that year, and, save in so far as may be provided by specific enactment in each case, the legislation required to give effect to the Financial Resolutions of each year shall be enacted within that year.*

[See notes, Article 24.]

**Article 37.**

*Money shall not be appropriated by vote, resolution or law, unless the purpose of the appropriation has in the same session been recommended by a message from the Representative of the Crown acting on the advice of the Executive Council.*

In this Article, as in many others, a ✓ convention of the British Constitution has in the Irish Constitution become positive law. Three Standing Orders of the British House of Commons made in the early years of the eighteenth century which, for upwards of a hundred years, were the only Standing Orders ordained for their self-government, whose regulations have been from time to time

extended and applied, have established the practice which has been faithfully maintained that every motion which in any way creates a charge upon the public revenue must receive the recommendation of the Crown. By this practice the great constitutional principle embodied in positive law under the Irish Constitution has been established and maintained: that the Sovereign, having the Executive power, is charged with the management of all the revenue of the State, and with all payments for public service. The Commons do not vote money unless it is required by the Crown, nor do they impose or augment taxes unless such taxation be necessary for the public service as declared by the Crown through its constitutional advisers. (See May's *Parliamentary Practice*, p. 545; see also p. 558). In the old Irish Parliament this salutary rule did not obtain. Its absence accounts for the following episode recorded in the reports of Sir James Caldwell (who was himself a member of the Irish House of Commons) of the debates of that body in 1763 and 1764, illustrative of the temper and tone of the Irish Parliament of that period. "It was moved that the petition of the widow of a calico printer praying aid to enable her to carry on her business which was presented and read be referred to a committee. A discussion arose on the principle of political economy involved in grants for such purposes of public money. The

mover of the petition said he thought it very hard that he should be the first to be refused, and that he failed to see why he should not have his job done as well as another. The word grated on the House, and the following description of a 'job' was given in debate.—The monosyllable 'job' is the name of a certain illegitimate child of Public Spirit, whom the world has agreed to call Job. Let me give an account of his descent and family, character and qualifications. Self-interest was the father, by whom Public Spirit has numerous issue distinguished by the name of Job. Many of them have come over from a neighbouring country, and have with great success played both . . . upon our weakness and our virtue. They very often assume their mother's name, and pretend that their father was Integrity—a gentleman of very honourable descent—who, having of late years been much neglected by persons of power and interest, has fallen into misfortune, and having been long in obscurity nobody knows where he is. Of late they (Jobs) have condescended to amuse themselves with great guns, howitzers and mortars, with powder, ball, fire and smoke, with warlike peace, and peacelike war. As to the places where they are to be found they have good company, and much associate with those in whom you place confidence. They are found at the Treasury Board, the Linen Board, the Barrack Board, and, in short, at every

other Board. Nor are they ever to be missed at Grand Juries or Societies that have the disposal of money." (See Whiteside's *Irish Parliament*, pp. 119-120.)

#### Article 38.

*Every Bill initiated in and passed by Dáil Eireann shall be sent to Seanad Eireann and may, unless it be a Money Bill, be amended in Seanad Eireann, and Dáil Eireann shall consider any such amendment; but a Bill passed by Dáil Eireann and considered by Seanad Eireann shall, not later than two hundred and seventy days after it shall have been first sent to Seanad Eireann, or such longer period as may be agreed upon by the two Houses, be deemed to be passed by both Houses in the form in which it was last passed by Dáil Eireann: Provided that every Money Bill shall be sent to Seanad Eireann for its recommendations and at a period not longer than twenty-one days after it shall have been sent to Seanad Eireann, it shall be returned to Dáil Eireann which may pass it, accepting or rejecting all or any of the recommendations of Seanad Eireann, and as so passed or if not returned within such period of twenty-one days shall be deemed to have been passed by both Houses: When a Bill other than a Money Bill has*

*been sent to Seanad Eireann a Joint Sitting of the members of both Houses may on a resolution passed by Seanad Eireann be convened for the purpose of debating, but not of voting upon, the proposals of the Bill or any amendment of the same.*

This Article emphasises the true character of the Senate in relation to the Dáil, as a body not of equal powers, but, subject to the provisions of Article 47, a consultative body with a suspensory power of a strictly temporary nature. The Article demonstrates that eventually in matters of difference between the Senate and the Dáil when all the avenues which may lead to an agreement by the consideration of amendments (and in the case of Money Bills recommendations of the Senate to the Dáil) have been explored without success, then that the Bill after a certain time has elapsed since it has been sent to the Senate shall be deemed to be passed by both Houses in the form in which it was last passed by the Dáil. As regards Money Bills the Irish Constitution differs from the practice and the law (see Article 35, and notes thereon) of the British Constitution, whereby the British House of Commons has exclusive control of legislation in relation to Money Bills which has been jealously asserted by that House in respect to the initiation and amendment of Money Bills, and finally as to

the power of the House of Lords to reject such Bills now removed by statute under the provisions of the Parliament Act, 1911.

This Article contains an ingenious provision for the bringing about of a direct intercourse by means of "informal conversations" and "face-to-face communications" between the two Houses with a view to a better understanding in relation to matters other than Money Bills. "When a Bill," the Article declares, "other than a Money Bill, has been sent to the Senate a joint sitting of the members of both Houses may, on a resolution passed by the Senate, be convened for the purpose of debating, but not of voting, upon the proposals of a Bill or any amendment of the same." 10 days gone by one of the methods by which, in the event of a disagreement between the two Houses of the British Parliament or the two Houses of the Irish Parliament, the reasons of difference might be stated so as to bring about an adjustment by way of compromise was a conference. The very ingenious provision in Article 38 embodies the conception of a conference while improving its machinery and ignores the formalities which in the Parliaments both of Great Britain and of Ireland proved fatal to its efficacy. A conference which, although in abeyance, is still a recognised method of British Parliamentary procedure, which may be at any time revived, was a formal meeting not of



the members of both Houses but of members appointed by their respective Houses, who were called the managers. The managers, on behalf of the dissentient House, are entrusted with the drafting of reasons of that dissent, and of delivering them to the managers of the other House. No argument is used or comment made unless the conference be a free conference, in which case each set of managers endeavours by persuasion to convince the others or in some way to effect an agreement between the Houses. Practically, conferences are not resorted to at the present time. No free conference of the Houses of Lords or Commons has been held since 1836, and until that year no free conference had been held since 1740. In 1851 the Houses by resolutions agreed to receive reasons for disagreement or insistence on amendments in the form of messages, unless a conference should be specially demanded by one or other House. The interchange of thought for which a joint session of both Houses would give so ample an opportunity would be likely to secure the enormous benefits which the old free conferences, in which the Houses did not collectively participate but were represented by elected managers, failed to effect. A joint session of both Houses in which votes should not be taken but opinion freely expressed with the genuine object of finding a basis of agreement would, in the

necessity of things, be devoid of the freezing formalities and insistence on rules of precedence and etiquette which both in Great Britain and in Ireland in the days of the Irish Parliament destroyed the benefits likely to accrue from a true conference dealing with realities as distinct from inanities. The ceremony of a conference is extremely formal. The Lords sit, the Commons stand; the Commons are bareheaded; the Lords except when speaking, are only required to take off their hats as they approach or leave their seats. So long as conferences were held in this country the Lords were so punctilious in guarding the orders and usages which had originated in their House with regard to them, and the Commons so jealous that nothing more in the way of ceremony and deference should be conceded to the Lords than usage demanded, that conferences frequently ended not in the adjustment of difficulties but in quarrels of extraordinary violence in respect to trifling matters of precedence. Disputes about points of ceremonial at conferences in Ireland were even more envenomed than at the conferences in England and destroyed the object of those meetings, which was "to continue a fair correspondence between the two Houses, which is the essence of Parliamentary proceedings."

**Article 39.**

*A Bill may be initiated in Seanad Éireann and if passed by Seanad Éireann shall be introduced into Dáil Éireann. If amended by Dáil Éireann the Bill shall be considered as a Bill initiated in Dáil Éireann. If rejected by Dáil Éireann it shall not be introduced again in the same session, but Dáil Éireann may reconsider it on its own motion.*

The provisions that a Bill initiated and passed by the Seanad Éireann introduced into Dáil Éireann if amended by Dáil Éireann shall be considered as initiated in Dáil Éireann is framed with a view of bringing a Bill of this character under the provisions of Article 38, relating to Bills initiated in and passed by Dáil Éireann which, if amended in Seanad Éireann, on consideration by Dáil Éireann of the amendments, after a certain period from the time at which such Bills shall have been first sent to Seanad Éireann shall be deemed to be passed by both Houses in the form in which they were last passed by Dáil Éireann. By this all danger of the permanent obstruction by Seanad Éireann of legislation approved by Dáil Éireann is avoided. The rule in the British Parliament that no Bill shall be offered in either Houses that is substantially the same as one on which their judgment has been already expressed in the current

session is, under the provisions of this Article, modified with the view of strengthening the control over legislation by Dáil Éireann.

**Article 40.**

*A Bill passed by either House and accepted by the other House shall be deemed to be passed by both Houses.*

**Article 41.**

*So soon as any Bill shall have been passed or deemed to have been passed by both Houses, the Executive Council shall present the same to the Representative of the Crown for the signification by him, in the King's name, of the King's assent, and such Representative may withhold the King's assent or reserve the Bill for the signification of the King's pleasure : Provided that the Representative of the Crown shall in the withholding of such assent to or the reservation of any Bill, act in accordance with the law, practice, and constitutional usage governing the like withholding of assent or reservation in the Dominion of Canada.*

*A Bill reserved for the signification of the King's Pleasure shall not have any force unless and until within one year from the day on which it was presented to the Representative of the Crown for*

*the King's Assent, the Representative of the Crown signifies by speech or message to each of the Houses of the Oireachtas, or by proclamation, that it has received the Assent of the King in Council.*

*An entry of every such speech, message or proclamation shall be made in the Journal of each House, and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of the Irish Free State (Saorstát Éireann).*

The late Sir Henry Jenkyns, K.C.B., who for upwards of thirty years filled the position of Parliamentary Counsel to the Treasury, in his standard work, *British Rule and Jurisdiction Beyond the Seas* (which was published after his death in 1899, with a preface by the late Sir Courtenay Ilbert, K.C.B., a learned Clerk of the House of Commons), thus expounds and explains the law, practice and constitutional usage governing the withholding of the King's assent to a Bill on the presentation of a Bill for the signification of the King's pleasure to the Representative of the Crown in the Dominion of Canada.

"As regards Canada, the British North American Act, 1867 (30 and 31 Vic., c. 3), provided (s. 55) that the Governor should in his discretion, subject to Her Majesty's instructions,

assent to or withhold assent to or reserve the Bill. Considerable discussion has arisen in the case of the Australian and Canadian Colonies as to whether the Governor in exercising these powers of assenting to, vetoing, or reserving Bills ought to act under the advice of his Colonial Ministers. The old doctrine was that the Governor was bound to exercise his discretion upon his own responsibility as an Imperial Officer, unfettered by the action of his Ministers but in accordance with the instructions of the Crown, and after consultation with his Ministers and (in case of assent) satisfying himself by legal advice that no legal objection exists to his assenting. This is still the case in colonies not self-governing. But in self-governing colonies the doctrine is, especially in the case of Canada, that the Governor must act as a constitutional sovereign, that is to say, act on the advice of his Ministers, unless he is prepared to dismiss or accept the resignation of these Ministers and to obtain other Ministers to carry into effect his policy. The dismissal or enforced resignation of Ministers is a reserve power which should be rarely exercised. In fact the frequent exercise of the power would practically make it impossible to carry on the Government. In consequence of the acceptance of this doctrine all provisions as to vetoing or reserving Bills have, since 1878, been struck out of the formal instructions given under the Royal

Sign Manual to the Governor-General of Canada, and any veto by the Governor on Imperial grounds must be given under less formal directions from a Secretary of State, or on his own responsibility. The practical result is, that in Canada the power of the Imperial Government is merely that of disallowing an Act which has been passed, and not that of vetoing a Bill before it becomes an Act." (Jenky's *British Rule and Jurisdiction Beyond the Seas*, pp. 114-115.)

#### Article 42.

*As soon as may be after any law has received the King's assent, the clerk, or such officer as Dáil Eireann may appoint for the purpose, shall cause two fair copies of such law to be made, one being in the Irish language and the other in the English language (one of which copies shall be signed by the Representative of the Crown to be enrolled for record in the office of such officer of the Supreme Court as Dáil Eireann may determine), and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies so deposited, that signed by the Representative of the Crown shall prevail.*

[See notes, Article 4.]

**Article 43.**

*The Parliament/Oireachtas shall have no power to declare acts to be infringements of the law which were not so at the date of their commission.*

This Article, declaring that the Parliament shall have no power to declare acts to be infringements of the law which were not so at the date of their commission, is similar to the provision in the United States Constitution, prohibiting both to Congress and to separate States the passing of a Bill of Attainder or an *ex parte facto* law.

**Article 44.**

*The Oireachtas may create subordinate legislatures with such powers as may be decided by law.*

**Article 45.**

*The Oireachtas may provide for the establishment of Functional or Vocational Councils representing branches of the social and economic life of the Nation. A law establishing any such Council shall determine its powers, rights and duties, and its relation to the government of the Irish Free State (Saorstát Éireann).*



**Article 46.**

*The Oireachtas has the exclusive right to regulate the raising and maintaining of such armed forces as are mentioned in the Scheduled Treaty in the territory of the Irish Free State (Saorstát Eireann), and every such force shall be subject to the control of the Oireachtas.*

└ This Article may be considered in close association with Articles 6, 70 and 71. The vesting in the Oireachtas of the control of the Army as well as the exclusive right to regulate the raising and maintaining of the Army is in accordance with the provisions of the Bill of Rights, which declares that the raising or keeping of a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law. That provision takes away the ordinary instrument of despotism against freedom and ensures the observance of the great constitutional rule—which under the provisions of the Irish Constitution has become in Ireland positive law—the rule that Parliament should be held once a year. The consequence has been that in England an annual Act of Parliament has been passed legalising the standing army, and granting supplies for the National armed force every year, and for no more than one year. The Bill of Rights recited all the

outstanding points of dispute between King and subject—the right to maintain a standing army among others—and decided them against the King. The right of raising, maintaining and controlling the army resides in Great Britain in the Sovereign, as first in military command within the kingdom, by virtue of his royal prerogative, which he now exercises on the advice of Ministers responsible to the House of Commons. That prerogative was thus exercised on a memorable occasion in recent times. In 1872 the Ministry of the day carried a Bill through the House of Commons abolishing the system of purchase in the Army. The Bill was rejected by the Lords. The Cabinet then decided that purchase could be abolished by Royal Warrant; that is, in virtue of the prerogative. “The King,” writes Blackstone, “in his capacity of General of the Kingdom has the sole right of raising and regulating the fleets and armies. We now consider the prerogative of enlisting and controlling them which indeed was distrusted and claimed contrary to all reason and precedent by the Long Parliament of Charles I, but upon the restoration of his son was solemnly declared by the Statute 13 Charles II, c. 6, to be in the King alone; for that the sole supreme Government and Command of the Militia within all His Majesty’s realms and dominions, and of all forces by sea and land, and of all forts and places

of strength, ever was and is the undoubted right of His Majesty and his royal predecessors, Kings and Queens of England, and that both or either House of Parliament cannot use might to pretend to the same." (Stephen's *Blackstone*, II., pp. 531-532). Mr. Bagehot, stating what the Sovereign could do by law without consulting Parliament, writes: "She [Queen Victoria] could disband the Army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men), she could dismiss all the officers from the General Commanding downwards, she could dismiss all the sailors too." (Bagehot's *English Constitution*. Introduction, p. xxxv.) Under this Article of the Irish Constitution the Army shall be subject to the control of the Oireachtas, and a condition of things which in Great Britain is the result of the practice, as distinguished from the law of the Constitution, and is produced by a series of understandings, checks and balances, is in Ireland the calculated effect of positive law.

The 8th Article of the Scheduled Treaty provides :

With a view to securing the observance of the principle of international limitation of armaments, if the Government of the Irish Free State establishes and maintains a military defence force, the establishments thereof shall not exceed in size such proportion

of the military establishments maintained in Great Britain as that which the population of Ireland bears to the population of Great Britain.

The 6th Article of the Constitution declares the liberty of the person to be inviolable, and that no person shall be deprived of his liberty except in accordance with law. The Article also enunciates the methods by which the liberty of the person is secured by the power vested in the judges of controlling and indeed hampering the Executive in action contrary to law violating the liberty of the person. It is, however, specially provided in the Article that nothing therein contained shall be invoked to prohibit control or interfere with any act of the military forces of the Irish Free State during the existence of a state of war or armed rebellion.

The exclusive right conferred on the Oireachtas of regulating armed forces in the territory of the Irish Free State would be futile if that right were not supplemented with the provision that every such force shall be subject to the control of the Oireachtas; in other words, that the Oireachtas where a military force has been made lawful, should be invested with power of legislation for the securing of discipline under all conditions of active service, war or peace. Macaulay puts the case for special legislation enforcing discipline in an army with irresistible clearness: "If there are,"

he writes, "to be regular soldiers it must be indispensable, both to their efficiency and to the security of every other class, that they should be kept under a strict discipline. An ill-disciplined army has ever been a mere costly and mere licentious militia, impotent against a foreign enemy, and formidable only to the country which it is paid to defend. Soldiers must be subject to a sharper penal code, and to a more stringent rule of procedure than are administered by the ordinary tribunals. Some acts which in the citizen are innocent must in the soldier be crimes, some acts which in the citizen are punished with fine or imprisonment must in the soldier be punished with death. The machinery by which courts of law ascertain the guilt or innocence of an accused citizen is too slow and too intricate to be applied to an accused soldier. For of all the maladies incident to the body politic military insubordination is that which requires the most prompt and drastic remedies. If the evil be not stopped as soon as it appears it is certain to spread—and it cannot spread far without danger to the very vitals of the Commonwealth." General Mulcahy, in introducing, as Minister of Defence in the Dáil Eireann, the Defence Force Temporary Provisions Bill, echoed, albeit unconsciously, the sentiment of Lord Macaulay on the absolute necessity of special provisions to secure discipline in an Army

when a state of war had ceased to exist. "If," he said, "they had not got an Army Bill or Act on the lines authorised in the present measure, and if the state of war passed, officers would have no authority over their men; the men need not obey their orders unless they chose to do so; soldiers could desert at will without any fear of consequences; and mutiny, the greatest of all military offences, would be equal to a mere trade dispute, or breach of contract."

#### **Article 47.**

*Any Bill passed or deemed to have been passed by both Houses may be suspended for a period of ninety days on the written demand of two-fifths of the members of Dáil Eireann or of a majority of the members of Seanad Eireann presented to the President of the Executive Council not later than seven days from the day on which such Bill shall have been so passed or deemed to have been so passed. Such a Bill shall in accordance with regulations to be made by the Oireachtas be submitted by referendum to the decision of the people, if demanded before the expiration of the ninety days either by a resolution of Seanad Eireann assented to by three-fifths of the members of Seanad Eireann or by a petition signed by not less than one-twentieth of the voters then on the*

*register of voters, and the decision of the people by a majority of the votes recorded on such Referendum shall be conclusive. These provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health or safety.*

This Article is one of the many striking negations of majority rule and instances of a determination to retard hasty and inconsiderate legislation with which the Irish Constitution abounds. On August 2, 1923, the late Court of Appeal held that the giving of the Royal Assent to the Public Safety Emergency Powers Bill ignored a provision of the Constitution, inasmuch as such Act was not declared by both Houses to be necessary for the immediate preservation of the public health and safety, and that the Act was not operative until the lapse of seven days from the day on which the Bill had passed—the time within which, on the written demand of two-fifths of the Members of the Dáil, or of a majority of members of the Seanad Éireann, any Bill may be suspended for a period of ninety days with a view to its decision by referendum.

“Now,” said Lord Chief Justice Molony, in the late Court of Appeal in the delivery of his judgment, “what does that section mean? A Bill

has passed both Houses, but still the rights of the members of both Houses of the Legislature do not cease to exist. It may be that a number of members of the Legislature may think that notwithstanding that it has, in fact, passed a majority of both Houses, that it is a case in which the people should have the ultimate decision upon the question. How are they to express their views? The only way by which their views can be expressed under the section is by a written demand. A written demand requires time. What time was to be given for that written demand? The section says seven days; consequently, the scheme of the section so far is this: A Bill passes both Houses, but, notwithstanding that it passes both Houses, two-fifths of the members of the Dáil, or the majority of the Senate, may think that there should be a referendum, and may express their thoughts in a constitutional manner under Article 47 by presenting a petition to the President of the Executive Council. That would be rendered nugatory, of course, if, immediately the Bill was passed and the demand was made, it was open to the President of the Executive Council to disregard the demand, and send it at once to the Governor-General, as has been contended. But that is not the meaning of the section at all. The word 'may' there casts a duty upon the President of the Ex-



ecutive Council, if he refuses such a written demand to submit it to referendum; and that is made perfectly clear by the words of the second clause, which says that such a Bill was in accordance with the regulations to be made by the Oireachtas, to be submitted by referendum to the decision of the people when it is taken in a proper manner. "Now, it was seen by the framers of this Constitution that circumstances may arise in which that clog upon rapid legislation might work injustice, and might, perhaps, do very grave or serious harm in the country, and, consequently, it was thought that in certain circumstances these provisions should not apply; and, accordingly, the concluding words of the section are: 'These provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health, or safety.' Of course, if a declaration was presented to us we would have nothing further to do. There is no evidence that such a declaration was ever made, except the third recital in the Act is to be considered such a declaration. We are not bound, or even entitled, in a case where the liberty of the subject is concerned, to assume that such a declaration was made."

**Article 48.**

*The Oireachtas may provide for the Initiation by the people of proposals for laws or constitutional amendments. Should the Oireachtas fail to make such provision within two years, it shall on the petition of not less than seventy-five thousand voters on the register, of whom not more than fifteen thousand shall be voters in any one constituency, either make such provisions or submit the question to the people for decision in accordance with the ordinary regulations governing the Referendum. Any legislation passed by the Oireachtas providing for such Initiation by the people shall provide (1) that such proposals may be initiated on a petition of fifty thousand voters on the register, (2) that if the Oireachtas rejects a proposal so initiated it shall be submitted to the people for decision in accordance with the ordinary regulations governing the Referendum; and (3) that if the Oireachtas enacts a proposal so initiated, such enactment shall be subject to the provisions respecting ordinary legislation or amendments of the Constitution as the case may be.*

On May 25, 1924, Mr. Cosgrave, President of the Executive of the Irish Free State, made a statement in which he rejoiced that the powers of initiation by the people of proposal for laws or constitutional amendments conferred under this

Article, and the powers of Referendum conferred under Articles 47 and 50, bestowed greater freedom on the citizens of the Irish Free State than the freedom enjoyed by British subjects under the Constitution of Great Britain.

**Article 49.**

*Save in the case of actual invasion, the Irish Free State (Saorstát Eireann) shall not be committed to active participation in any war without the assent of the Oireachtas.*

This Article provides that "save in the case of actual invasion the Irish Free State shall not be committed to active participation in any war without the consent of Parliament." The nearest historic analogy to this Article is probably the second Article of the Act of Settlement, which provides that "in case the Crown and Imperial dignity of the realm shall hereinafter come to any person not being a native of the Kingdom of England, the nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the Crown of England without the consent of Parliament." The Article of the Treaty constitutes in itself a departure from the theory of the Constitution in reference to the relations as defined by law between Great Britain and the Dominions. A declaration of war by the

King of England involved Ireland before the Union in that war, just as theoretically at the present day such a declaration would involve in that war the Dominions of the Crown. The apparent departure from the practice of the Constitution involved in this Article may be regarded as virtually in harmony with that practice, when it is remembered that the power conferred on the Irish Parliament of preventing the Free State from becoming involved in war is not absolute but limited ; that according to the strict letter of the Constitution at the present time, the Dominions are *ipso facto* at war with any country with which Great Britain is at war—a circumstance which has as one of the results of the Great War, led to the securing in practice by these Dominions of a powerful voice in the direction and control of foreign policy ; and that Ireland is given like status and like power by the provision of the very first Article of the Irish Constitution, which declares that the Irish Free State is an equal member of the community of nations forming the British Commonwealth of Nations. To these considerations there must be added the position of the Irish Free State in the League of Nations, and the trend of world-wide public opinion in favour of the conversion of international morality into international positive law and the consequent régime not of war but of peace for which the League of Nations stands.

See Articles 1 and 2, and notes thereon.

**Article 50.**

*Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters on the register, or two-thirds of the votes recorded, shall have been cast in favour of such amendment. Any such amendment may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof.*

This Article, while providing that amendments to the Constitution within the terms of the Scheduled Treaty may be made by the Parliament, prescribes that the Constitution can only be altered by a referendum. Amendments of the Irish Constitution are accordingly placed on a different footing from ordinary laws. When a Constitution

is written (unlike the British Constitution, which is unwritten) it is seldom changeable (as the British Constitution is changeable) by the ordinary process of legislation. The ordinary legislature in a written Constitution is not omnipotent, whereas the British Parliament is omnipotent, and works with the same procedure, whether it is repealing an obsolete form, or whether it is disestablishing a church, or extending the franchise to a million or more of its fellow citizens. "Each Act of Union (Scottish and Irish) involved," writes Sir William Anson, "the absorption of the sovereign legislative bodies in a new body different from either but possessing the powers of each, and each Act of Union contained provisions designed to be fundamental and unchangeable. No question was raised or could be raised as to the power of either Parliament to make this important change, but in each case the fundamental provisions have been altered by subsequent legislation. This departure from terms which were intended to be permanent is the more noticeable because each Act was preceded by the settlement of the conditions of Union which is described as a Treaty." (See Anson's *Law and Custom of the Constitution*, Vol. I., : Parliament, Introduction, pp. 7-8). Professor Dicey writing a generation ago thus admirably distinguishes by anticipation the characteristic features of the British and of the Irish Constitutions. "A flexible Constitution is

one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body. The flexibility of our Constitution consists in the right of the Crown and the two Houses to modify or repeal any law whatever; they can alter the succession to the Crown in the same way in which they can pass an Act enabling a company to make a new railway from Oxford to London. With us, therefore, laws are called constitutional because they refer to subjects which are supposed to affect the fundamental institutions of the State, and not because they are more sacred or difficult to change than otherwise." (Dicey's *Law of the Constitution*, pp. 114-115.) The framers of the Irish Constitution have, like the French and American Constitution makers, limited the authority of the legislature. They have, moreover, directed their attention—to use the words of Professor Dicey in relation to the framers of the American Constitution—"to the invention of means by which the effect of unconstitutional laws may be nullified, and this result they have achieved by making it the duty of every judge to treat as void any enactment which violates the Constitution, and thus have given to the restrictions contained in the Constitution on legislative authority the character of real laws, that is, of rules enforced by the courts. This system, which renders the judges the guar-

dians of the Constitution, provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation." (Dicey's *Law of the Constitution*, pp. 124-125.)

The Irish Parliament before the Union, differed from the Irish Parliament under the Irish Constitution. The old Irish Parliament was in theory an independent sovereign Legislature. In the old Irish Parliament fundamental or so-called constitutional laws were changed in the same manner as other laws, by Parliament acting in its ordinary legislative character. The Irish Parliament under the Irish Constitution can only eventually make amendments of that Constitution within the terms of the Scheduled Treaty; and these amendments must be submitted to a referendum of the people and shall not be passed unless a majority of the voters on the register record their votes, and unless a majority of the voters on the register or two-thirds of the votes recorded are in favour of the amendment. The Irish Parliament is, however, not subject to restrictions so stringent as the Congress of the United States in its power to make amendments of the Irish Constitution. Under the Constitution of the United States it is provided that no amendment of the Constitution shall be made unless, in the words of the Hon. J. M. Beck, Solicitor-General of the United States: "it was proposed by at least two-thirds of the Senate and



House of Representatives and ratified by three-fourths of the States through their Legislatures, or through special conventions." It should be borne in mind that amendments of the Constitution to which this Article is applicable are amendments passed by the Oireachtas after the expiration of a period of eight years from the date of the coming into operation of this Constitution. Amendments of the Constitution may be made within the said period of eight years by means of ordinary legislation, and as such should be subject to the provisions of Article 47.

#### **Article 51.**

*The Executive Authority of the Irish Free State (Saorstát Eireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown. There shall be a Council to aid and advise in the government of the Irish Free State (Saorstát Eireann) to be styled the Executive Council. The Executive Council shall be responsible to Dáil Eireann, and shall consist of not more than seven nor less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council.*

In relation to Dominion status, see notes, Article 1. As regards the constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada by the Representative of the Crown, see notes, Article 1. As regards the exercise of the prerogative of dissolution, see notes, Article 28. As regards duties of Executive Council, see Article 54 ; as to the giving or withholding of the Royal Assent to Bills, Article 42. The provision establishing a Council to aid and advise in the Government of the Irish Free State to be styled the Executive Council is an embodiment in written law of an understanding on which responsible government is based, and an instance of the inclusion of the unwritten constitutional understandings in a written instrument of constitutional law for a country with a Dominion status. In 1867 the British Parliament inserted in the North American Act by way of partial fulfilment of the recital that it was expedient to declare the nature of the Executive Government the provision that there should be a Council to aid and advise in the Government of Canada, and that its members should be appointed and might be removed by the Governor-General. ✓ It is of interest to notice that the term "Cabinet" does not appear, though the term is commonly applied to the body of Ministers forming the Executive Council. The provision that the Executive Council

shall be responsible to Dáil Eireann is a reduction to writing of the real relations of the Executive to the Legislature, and a reproduction of the unwritten constitutional convention of Great Britain—that the Cabinet is responsible to the House of Commons. This enactment and incorporation in the positive law of the Irish Free State of an essential constitutional understanding in England can be best realised in its significance and importance from the fact that in the earlier instruments embodying Colonial constitutions there is nothing to suggest that Colonial Ministers shall hold office during good behaviour, or indeed that the administration is to be conducted on the advice of Parliamentary chiefs at all. Thus in the New Zealand Constitution of 1852, legislative and judicial organisation are alone considered. It was resolved to apply for an English Act to establish responsible Government, but the Colonial Office intimated that an enactment was unnecessary, as the practice rested upon usage. The limitation of the number of the members of the Executive Council is a distinct improvement on the English system, in which the Executive is scarcely defined at all, and in which the numbers of the Cabinet vary very considerably. By the provision which secures a small Cabinet responsibility is necessarily concentrated. Mr. Lloyd George on the 19th December, 1916, thus contrasted a small with a large Cabinet: "It is

true that in a multitude of Counsellors there is wisdom. That was written for Oriental countries in peace times. You cannot run a war with a Sanhedrim. That is the meaning of a Cabinet of five."

The appointment of members of the Executive Council is made by the Representative of the Crown on the nomination of the President of the Executive Council. In England the Prime Minister must obtain the formal approval of the King to the appointment of his colleagues, but need consult no one. Under the Irish Constitution the Ministers who are to hold office as Ministers of the Executive Council are appointed by the Governor-General, on the nomination of the President with the assent of the Dáil. (See Article 53.)

#### **Article 52.**

*Those Ministers who form the Executive Council shall all be members of Dáil Eireann, and shall include the President of the Council, the Vice-President of the Council and the Minister in charge of the Department of Finance.*

The constitutional understanding which associates political office in England with membership of Parliament has become enshrined in the positive

law of the Constitution of the Irish Free State, and has been developed by the provision that the Ministers who form the Executive Council shall all be members of the Dáil, whereas in England the membership of Parliament which according to practice is an essential condition of the retention of political, or, to speak more accurately, of Cabinet office is not confined to a membership of the House of Commons but of either House. Mr. Pitt in his first Cabinet, which consisted of seven members, was himself the only member who was not a peer. In later times the trend of constitutional practice is in favour of certain great offices, notably the Home Secretaryship and the Chancellorship of the Exchequer, being held not by peers but by commoners, and the appointment to the Premiership of Mr. Baldwin in preference to the Marquis Curzon seems to mark a stage in constitutional development at which the holder of a seat in the House of Lords is no longer eligible for the position of Prime Minister. There is no statute or legal usage in Great Britain which requires that Ministers should hold seats in a House of Parliament; but Mr. Gladstone, in expressing a desire to fix attention on the identification in Great Britain of the Minister with the member of a House of Parliament, emphasises the importance of the observance as of the essence of Parliamentary Government. The fusion of legislative and execu-

tive functions secured by the holding of a seat in the Dáil, as a condition precedent to the appointment to a seat in the Executive Council, brings the Irish Constitution into the category of the Cabinet as distinct from the Presidential system. The independence of the legislative and executive powers is, according to Mr. Bagehot, the specific quality of Presidential Government, just as their fusion and combination are the precise principle of Cabinet Government.

### **Article 53.**

*The President of the Council shall be appointed on the nomination of Dáil Eireann. He shall nominate a Vice-President of the Council, who shall act for all purposes in the place of the President, if the President shall die, resign, or be permanently incapacitated, until a new President of the Council shall have been elected. The Vice-President shall also act in the place of the President during his temporary absence. The other Ministers who are to hold office as members of the Executive Council shall be appointed on the nomination of the President, with the assent of Dáil Eireann, and he and the Ministers nominated by him shall retire from office should he cease to retain the support of a majority in Dáil Eireann, but the President and*

*such Ministers shall continue to carry on their duties until their successors shall have been appointed: Provided, however, that the Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Éireann.*

The Irish Parliament under the Irish Constitution will not be, either theoretically or virtually, like the old Irish Parliament under Grattan's Constitution, a Sovereign Parliament, but it will have an inestimable advantage not possessed by the old Irish Parliaments. It is provided by Article 53 that "the President of the Executive Council and the Ministers nominated by him shall retire from office should he cease to retain the support of a majority in the Dáil." The Irish Governments in the interval between 1782 and 1800 consisted practically of the Lord Lieutenant and his secretary. They were not chosen by the Irish Legislature but by the English Government, whose creatures they were and whose policy they came to Ireland to maintain. They went in and out of office with the English Government, whose nominees they were. In Ireland there was no Irish administration responsible to the Irish Parliament, and through that Parliament to the Irish nation. An adverse vote of the Irish Parliament disturbed them not. Thus the Irish House of Commons in

1789 passed a vote of censure on the Marquis of Buckingham couched in terms of extraordinary reprobation: " ' That His Excellency the Lord Lieutenant's answer to both Houses of Parliament requesting him to transmit their address to His Royal Highness the Prince of Wales, is ill-advised, contains an unwarranted and unconstitutional censure on the proceedings of both Houses of Parliament, and attempts to question the undoubted rights and privileges of the Lords Spiritual and Temporal and the Commons of Ireland.' Carried, Ayes, 115; Noes, 83 " : (*Irish Debates*, IX., pp. 153-155). The Lord Lieutenant, however, retained his office. Again, Lord Castlereagh's first proposal to the Irish Parliament on the question of Union miscarried, an amendment in favour of an independent Legislature being lost by a single vote. A virtual defeat on a leading question of policy would in accordance with constitutional practice in Great Britain, and in accordance with constitutional law in Ireland under the provisions of the Irish Constitution, entail the resignation of the Ministry. But Lord Castlereagh, looking for support not to Ireland but to England, recognised no such principle of action, clung tenaciously to his office and eventually succeeded in the carrying of the Union by corruption. The want of responsible government in Ireland was bitterly deplored and by no one so bitterly as Grattan himself. He com-



plained in the Irish House of Commons in 1793 of "the fatal hand of an Irish Cabinet legislating against Ireland to promote its own credit in the Court of Great Britain." Mr. Fox, in the British House of Commons on the 23rd March, 1797, said in reference to Ireland: "The advantages which the form of a free Government seemed to promise have been counteracted by the influence of the (Irish) Executive Government and the British Cabinet." Again, Grattan laments the defects of the Constitution named from him. "We have," he said, "no Irish Cabinet. Individuals may deprecate, may dissuade, but they cannot enforce their principles. There is no embodied authority in Ireland."

The simple words, "that the President of the Council shall be appointed on the nomination of the Dáil Eireann," are a reduction to practical reality of the method of the appointment of a Prime Minister in England, which is concealed by a cloud of unrealities. In England a man becomes Prime Minister by kissing the King's hands, and accepting the commission to form a Ministry. "There is," writes Mr. Gladstone, "one great and critical act the responsibility for which falls momentarily or provisionally on the Sovereign. It is the dismissal of an existing Minister and the appointment of a new one." In Ireland, under the provisions of this Article, the appointment of a Ministry is placed

actually, as it is virtually in England, in the hands of the elected representatives of the people. The King, no doubt, appoints a Prime Minister, but the man to be selected is indicated by signs of popular favour which are irresistible. He is virtually the nominee of the House of Commons, and, under modern conditions, the nominee of the constituencies. Mr. Bagehot, writing in 1865, says: "The House of Commons is an elected Chamber; it is the assembly which chooses our President (Premier)." Mr. Low, writing in 1904, thinks that the power of choosing a Prime Minister has been transferred from the House of Commons to the electorate. "It is," he writes, "the constituencies which in fact decide on the combination of party leaders to whom they will from time to time delegate their authority. . . . The member of Parliament sent to the House of Commons by his constituents goes there under a pledge that he will cast his vote under all normal conditions during the life of the Parliament for the authorised leader of his party." Under the clear and express provisions of the Irish Constitution Dáil Eireann is the body in whom is vested the selection of the President of the Executive Council. The questions which at times agitate the British public as to advice tendered by an outgoing Prime Minister to the Sovereign as to the choice of his successor do not arise in Ireland, since that choice

is absolutely vested in the Dáil Eireann who are presumably the trustees of the electorate. In Great Britain the colleagues of a Prime Minister in the Cabinet are appointed by the Sovereign on his advice. The Prime Minister is supreme in the matter of these appointments. Under the Irish Constitution the provisions that these appointments should be subject to the assent of the Dáil is in itself a security against the appointment of men who lack the confidence of the Dáil and the electorate. "A Prime Minister," writes Sir William Anson in relation to the British Cabinet, "in filling the subordinate offices of Government will probably (there have been certainly grave derelictions from the practice thus enunciated) choose men who have shown themselves acceptable to the House of Commons. There are cases in which neither the men nor the offices occupy to an appreciable extent the attention of the electorate, and to this extent the House of Commons does exercise a real, though not a dominating, effect upon the choice of Ministers." It may be said that the Dáil as trustee of the electorate exercises in all cases a real and a dominating effect on the choice of the members of the Executive Council. The provision that the President and Ministers who are appointed by him shall retire from office should they cease to retain the support of a majority in Dáil Eireann is an enunciation and

incorporation in the Irish Constitution of the doctrine of constitutional morality expounded and explained by Mr. Balfour, speaking as Prime Minister in the House of Commons, on the 24th July, 1905, in relation to the attitude of a Government which had sustained a defeat in the British House of Commons: "The only Parliamentary issues which have always been regarded as conclusive (evidence of the fact that a Government has ceased to retain a support of a majority in the House of Commons, and accordingly should resign) are those in which there has been a trial of strength between the parties, with all the circumstances of notice and other attendant incidents to make it clear that the issue to be decided is one of confidence or no confidence." The principle enunciated in the words that "The President and the Ministers nominated by him shall under such circumstances retire from office," is further strengthened by the provisions of Article 54, declaring the collective responsibility of the Executive Council and that the Executive Council shall meet and act as a collective authority. The provision that the President and the Ministers nominated by him shall continue to perform their duties until their successors shall have been appointed is yet another incorporation in the positive law of the Irish Constitution of a convention of constitutional morality in the practice of the British Constitution.

The provision that the Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Eireann makes the Dáil Eireann, unlike the House of Commons, the actual master of the Executive. The power of the Cabinet which has been defeated in the House of Commons to advise the exercise of the prerogative of dissolution—advice which, according to recent practice, is acted on by the Sovereign—a power which it has been asserted can be exerted by the Prime Minister alone irrespective of the advice and the knowledge of his colleagues, has often been the subject of comments by statesmen and theoretical writers. The fact is that in Great Britain a Cabinet, in itself although indirectly the creation of the House of Commons, can destroy the House of Commons by which it has itself been created by advising the Crown to dissolve Parliament. Mr. Bagehot demonstrates this position with his wonted lucidity of expression.

“The Cabinet is,” he writes, “a committee which can dissolve the assembly which appointed it; it is a committee with a suspensive veto, a committee with a power of appeal. Though appointed by one Parliament, it can appeal, if it chooses, to the next. Theoretically, indeed, the power to dissolve Parliament is entrusted to the Sovereign only, but the Cabinet, neglecting small

and dubious exceptions, which was chosen by one House of Commons, has an appeal to the next House of Commons. The chief committee of the Legislature has the power of dissolving the predominant part of that Legislature—that which, at a crisis, is the supreme Legislature. . . . It is a creature, but it has the power of destroying its creators. It is an executive which can annihilate the Legislature, as well as an executive which is the nominee of the Legislature. It *was* made, but it *can* unmake ” : (Bagehot’s *English Constitution*, p. 15). Sir William Anson, as a theoretical writer with a practical experience in Parliament as a member of the Government with the working of the Constitution, writes : “ The weapon by which the Prime Minister or the Cabinet enforces its will upon the House of Commons is the threat of a dissolution. The mere intimation that, if the necessary support is not given to a Government, its careless or lukewarm supporters may be sent to explain their conduct to their constituents has been known to produce the desired results.” Mr. Gladstone thus speaks of the power of the prerogative of dissolution. “ That prerogative,” he writes, “ must have been in a healthy state in 1852 to enable a Government, supported only by a minority, to perform the work of the session and to carry the Supplies before asking the judgment of the constituencies on its title to exist.” The

power of the exercise of the prerogative of dissolution on the advice of a Cabinet has been demonstrated in 1923 by the dissolution, on the advice of a Cabinet, of a House of Commons, the majority of whose members were loyal supporters of the very Cabinet on whose advice it was dissolved.

**Article 54.**

*The Executive Council shall be collectively responsible for all matters concerning the Departments of State administered by Members of the Executive Council. The Executive Council shall prepare Estimates of the receipts and expenditure of the Irish Free State (Saorstát Eireann) for each financial year, and shall present them to Dáil Eireann before the close of the previous financial year. The Executive Council shall meet and act as a collective authority.*

The doctrine of collective responsibility was not recognised till the closing decades of the eighteenth century. Ministerial responsibility meant to the statesmen of former generations something far different from what it means to men of the present day. It meant in days gone by legal responsibility—a liability to impeachment which could not fairly be fixed upon an entire cabinet for the conduct of one of its members

at the present time ; it now means responsibility to public opinion and liability to loss of office. Since loss of office and of public esteem are the only penalties which Ministers pay for political failure, we can insist that the action of the Executive Council is the action of each member and that for the action of each member, if not disavowed and censured by his colleagues, the Executive Council is responsible as a whole. The doctrine of collective responsibility was on the 9th July, 1782, recognised by Mr. Fox, although his views on the subject were not consistent. . . Mr. Fox held himself responsible to Parliament for advice as to conferring a pension on Colonel Burré, " although he was not a person in whose department it lay to advise the King on that subject." Collective responsibility, which is essential to a homogeneous Cabinet, may be regarded as a firmly established principle of the British Constitution since May, 1792, when Mr. Pitt insisted on the dismissal from office of Lord Chancellor Thurlow who had long been a false and froward colleague. The doctrine of collective Cabinet responsibility was thus enunciated by the Earl of Derby, the famous Victorian Prime Minister, speaking in the House of Lords on 29th June, 1854 : " The essence of responsible Government is that natural bond of responsibility one for another whenever Governments acting by party are acting together and frame their measures in



concert, and when if one member fall to the ground, the others as a matter of course fall with him." This definition, however, implies a definite and unqualified responsibility attached to a Minister of the Crown for any wrongful act which, exclusively concerns his own department, whether the consequence be far-reaching or otherwise, unless his colleagues expressly accept a participation in that responsibility.

The principle of collective responsibility is enforced by the provision that the Executive Council shall prepare Estimates of the receipts and expenditure of the Irish Free State for each financial year, and shall present them to the Dáil before the end of the year. Minute criticism of the proposed outlay is the work of the Treasury before the Estimates are submitted to the Dáil, but for that work the Council as a whole must be responsible. "The nicest of all adjustments," writes Mr. Gladstone, "involved in the working of British Government is that which determines without formally defining [as the Irish Constitution attempts to do] the internal relations of the Cabinet. On the one hand, while each Minister is an adviser of the Crown the Cabinet is a unity, and none of its members can advise as an individual without or in opposition, actual or presumed, to his colleagues. On the other hand, the business of the State is a hundred-fold too great in volume to allow of the

actual passing of the whole under the view of the collected Ministry. It is, therefore, a prime office of discretion for each Minister to settle what are the departmental acts in which he can presume the concurrence of his colleagues, and in what more delicate or weighty or peculiar cases he must positively ascertain it."

#### **Article 55.**

*Ministers who shall not be members of the Executive Council may be appointed by the Representative of the Crown and shall comply with the provisions of Article 17 of this Constitution. Every such Minister shall be nominated by Dáil Eireann on the recommendation of a Committee of Dáil Eireann chosen by a method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann. Should a recommendation not be acceptable to Dáil Eireann, the Committee may continue to recommend names until one is found acceptable. The total number of Ministers, including the Ministers of the Executive Council, shall not exceed twelve.*

#### **Article 56.**

*Every Minister who is not a member of the Executive Council shall be the responsible head of*

*the Department or Departments under his charge, and shall be individually responsible to Dáil Eireann alone for the administration of the Department or Departments of which he is the head: Provided that should arrangements for Functional or Vocational Councils be made by the Oireachtas these Ministers or any of them may, should the Oireachtas so decide, be members of, and be recommended to Dáil Eireann by, such Councils. The term of office of any Minister, not a member of the Executive Council, shall be the term of Dáil Eireann existing at the time of his appointment, but he shall continue in office until his successor shall have been appointed, and no such Minister shall be removed from office during his term otherwise than by Dáil Eireann itself, and then for stated reasons, and after the proposal to remove him has been submitted to a Committee, chosen by a method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann, and the Committee has reported thereon.*

**Article 57.**

Every Minister shall have the right to attend and be heard in Seanad Eireann.

Some of the Colonies, notably the Legislature of the Union of South Africa (and previously to the

establishment of that Union the Legislatures of Natal and Cape Colony) have adopted the continental plan of giving Ministers audience in both Houses, although they only vote in the House to which they belong. Under the Irish Constitution all Ministers of the Executive Council must be members of the Dáil. Mr. Gladstone, when the Home Rule Bill of 1893 was passing through the House of Commons, vehemently opposed a proposal of Mr. (Lord) Courtney (of Penwith) that Ministers of the Crown if members of one House of the Irish Legislature should be permitted to speak though not to vote in the other, on the ground that such a proposal if entertained would create an invidious distinction between Ministers of the Crown and unofficial members of Parliament. Mr. Gladstone indeed declared, that he would not sit in any assembly in which there was so grave a departure from the essential principle of the strict equality of members. The provision enabling Ministers to attend and be heard in the Senate of the Irish Free State may well be placed in the category of the preference accorded in the British Parliament to Ministers of State by the order of business. Such preference is, of course, only looked upon as a position of duty. It is conceded to members who are conducting the business of the State. It should moreover not be forgotten that Ministers appointed under the provisions of Articles

55 and 56 will not necessarily be members of the Dáil. The Article gives the Ministers the right to be heard. It is reported of Sir Spencer Compton that when he was Speaker of the British House of Commons he used to answer a member who called upon him to make the House quiet for that he had a right to be heard: "No, sir, you have a right to speak, but the House has a right to judge whether it will hear you." "In this," writes Hatsell, "the Speaker was wrong. The member has the right to speak, and it is the Speaker's duty for that purpose to endeavour to keep the House quiet."

#### **Article 58.**

*The appointment of a member of Dáil Éireann to be a Minister shall not entail upon him any obligation to resign his seat or to submit himself for re-election.*

This Article is a very striking proof of the confidence of the framers of the Irish Constitution, that under its provisions the Ministers should be not the opponents but the faithful servants of the Irish Legislature. The terms of the Article providing that the appointment of a member of the Dáil to be a Minister shall not entail upon him any obligation to resign his seat, or to submit himself

for re-election have an historic origin. The 6th Article of the Act of Settlement passed in 1701, under which the present King occupies the Throne, provides that no person who has any office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving in the House of Commons. The absolute exclusion of all placemen, an exclusion which was not to come into operation till the accession of the House of Hanover, was found on cool reflection too impracticable to be maintained. A revision of the Article took place in 1705, whereby the provisions were established which to a great extent are still law in Great Britain; first, that every member of the House of Commons accepting an office under the Crown, except a higher commission in the Army, shall vacate his seat, and a new writ issue; secondly that no person holding an office vacated since the 25th October, 1705, shall be capable of being elected or re-elected at all. In Great Britain many unsuccessful efforts have been made for the repeal of the Place Act, which have been resisted, not indeed owing to jealousy of the influence of the Crown, but to the fear that an occasion might arise in which a House of Commons might support a Government whose members in that House had not on taking office to submit themselves to their constituents, and which was unpopular in the country. A modification of the Place Act was, in

1919, accepted as a compromise for its repeal, whereby the provisions of the Place Act were not to be put into operation during the first nine months of the existence of a Parliament. In Ireland, however, the legal limitation of the existence of a Dáil to four years, the security of the liberty of the citizens of the Free State under the provisions of the Irish Constitution, the safeguard provided by the referendum, the practically unrestricted franchise, the power of the Press, and the close association of members of the Dáil with their constituents—all contribute to render the Dáil the express image of the people, and to secure that the Executive Council, which is a committee of the Dáil itself, will be virtually the choice of the electorate. The framers of the Irish Constitution have grasped the principle that by the evolution of constitutional Government the representatives of the people—their deputies in reality as well as in name—appoint a Government dismissable at pleasure who will be the servant of the Dáil, and through the Dáil of the people at large.

#### **Article 59.**

*Ministers shall receive such remuneration as may from time to time be prescribed by law, but the remuneration of any Minister shall not be diminished during his term of office.*

**Article 60.**

*The Representative of the Crown, who shall be styled the Governor-General of the Irish Free State (Saorstát Eireann) shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments. His salary shall be of the like amount as that now payable to the Governor-General of the Commonwealth of Australia, and shall be charged on the public funds of the Irish Free State (Saorstát Eireann) and suitable provision shall be made out of those funds for the maintenance of his official residence and establishment.*

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Each Governor holds during the pleasure of the King, but the usual term of office is six years. Since 1875 the practice has been to create the office of Governor in each colony by Letters Patent, and then to make such appointment to the office by commission under the Royal Sign Manual, and to give to the Governor so appointed instructions in a uniform shape under the Royal Sign Manual. The Commission is countersigned by a Secretary of State. The instructions are often approved by Order in Council, and are all issued under the Royal Sign Manual, with the "signet" attached by the Secretary of State, but without his countersig-



nature ; subsequently special instructions are given to the Governor through the Secretary of State. The Letters Patent commission appointment and instructions are commonly, for the sake of brevity, referred to as "the Governor's Commission." (See Jenkyns' *British Rule and Jurisdiction Beyond the Seas*, pp. 99-100.) The Governor's commission contains only a provision requiring all military officers to obey him, but does not confer on him military command. As regards Canada, by s. 15 of the British North American Act (30 & 31 Vic., c. 3), the command-in-chief of the Land and Naval Militia, and of all naval and military forces of and in Canada, was declared to continue and be vested in the Queen (Victoria). In accordance with that section the Canadian Militia Act of 1868, provides that " the command-in-chief of the land and naval militia, and of all naval and military forces of and in Canada, is vested in the Queen, and shall be exercised and administered by Her Majesty personally, or by the Governor as her representative." But the commission of the Governor does not give him more military power than that of any other Governor. (See Jenkyns' *British Rule and Jurisdiction Beyond the Seas*, pp. 100 and 102.) See Article 46, and notes thereon. " The Commission of a Governor," writes Sir Henry Jenkyns, " gives very little express power. In a characteristically English way it defines but little, and by authoris-

ing the Governor to do and execute all that belong to the office incorporates the practice without stating it. This provision of the commission and the dependence of the powers of the Governor upon his commission give great elasticity. An examination of colonial history during the past thirty or forty years shows that there has been a gradual change in the position of the Governor—that in the self-governing colonies he has gradually become more of a constitutional sovereign and less of an actual governor. He ‘ reigns ’ more and ‘ governs ’ less. In other words he acts less upon his personal opinion and more upon the advice of his Ministers.” Jenkyns’ *British Rule and Jurisdiction Beyond the Seas*, pp. 103-105.)

The fixing of the salary of the Governor-General of the Free State at the like amount per annum as that now payable to the Governor-General of Australia is a welcome step in favour of economy. The Lord Lieutenant of Ireland under the old system was paid £20,000 per annum. The salary of the Lord Lieutenant was reduced from £30,000 to £20,000 per annum owing to the fact that a Duke of Northumberland—an enormously rich nobleman—on being appointed to the Irish Viceroyalty undertook to discharge the duties of the office at this reduced salary. The Lord Lieutenant on his appointment was granted an allowance of £5,000 for outfit. Before the establish-

ment of the Irish Constitution of 1782, there have been cases—at least three in the eighteenth century—in which noblemen have been appointed to the Lord Lieutenancy which they have resigned without setting foot in Ireland, having pocketed “the allowance for outfit.”

#### **Article 61.**

*All revenues of the Irish Free State (Saorstát Eireann) from whatever source arising, shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes of the Irish Free State (Saorstát Eireann) in the manner and subject to the charges and liabilities imposed by law.*

The institution of a Consolidated Fund, which is established by the Constitution of the Irish Free State, is the result of a study of the British Constitution, in which the desire for a Consolidated Fund sprung from a very trying previous experience. The British Consolidated Fund was established in 1787 (27 Geo. III, c. 13). From the Revolution till 1787 it had been the practice to assign specific taxes to specific charges, with the result that the public accounts became extremely complicated. The Consolidated Fund was

at last established "into which was to flow every stream of the public revenue, and from whence to issue the supply for every public service. The produce of particular taxes was no longer appropriated to particular spheres of expense." (Anson's *Law and Custom of the Constitution*, II. The Crown. Part II., p. 147.)

#### **Article 62.**

*Dáil Eireann shall appoint a Comptroller and Auditor-General to act on behalf of the Irish Free State (Saorstát Eireann). He shall control all disbursements and shall audit all accounts of moneys administered by or under the authority of the Oireachtas and shall report to Dáil Eireann at stated periods to be determined by law.*

#### **Article 63.**

*The Comptroller and Auditor-General shall not be removed except for stated misbehaviour or incapacity on resolutions passed by Dáil Eireann and Seánad Eireann. Subject to this provision the terms and conditions of his tenure of office shall be fixed by law. He shall not be a member of the Oireachtas nor shall he hold any other office or position of emolument.*

The establishment by the Free State Constitution of the office of Comptroller and Auditor-General of the Irish Free State is yet another incorporation in that Constitution of a notable feature of the British Constitution. The office of Comptroller and Auditor-General in Ireland is almost a copy of the British original. "The public service," writes Sir William Anson, "is maintained by payments made under the direction of the Treasury out of the National balance—the Consolidated Fund. But neither the Lords of the Treasury, the political Executive, nor their permanent staff, can touch this balance without the intervention of an official who is remote alike from royal and political influences. This is the Comptroller and Auditor-General—the creation of the Exchequer and Audit Act, 1866 (29 & 30 Vic., c. 39, s. 3). He is appointed by letters patent. Neither he nor the Assistant-Comptroller and Auditor may be a member of either House of Parliament. They hold office during good behaviour, and are removable by the King upon an address of both House of Parliament. They may not hold offices in combination with any others held at the pleasure of the Crown. Their salaries are charged on the Consolidated Fund so that they do not come under the annual consideration of the House of Commons." (Anson's *Law and Custom of the Constitution*, II. The Crown, Part II., p. 151.)

Again, the Comptroller-General is also the Auditor-General. In that capacity he must satisfy himself, by an examination of the accounts either periodical or concurrent during the financial year, that the payments for which he has given credit are not merely spent on the public service but have been spent on the services for which he set free the Exchequer balance—that is, for the services specified by Parliament. If not satisfied on this point he must report the facts to Parliament in detail. . (Anson's *Law and Custom of the Constitution*, II. The Crown, Part II., pp. 137-138). “It is the business of the Treasury to take heed firstly, by supervision of the Estimates, that the demands made upon Parliament by the King's Ministers are not excessive; and secondly, that the directions of Parliament as to issue and expenditure of public money are exactly fulfilled by the departments concerned. And in this last respect if we ask: *Quis custodiet ipsos custodes?* the answer is prompt and effective: The Comptroller and Auditor-General.” (Anson's *Law and Custom of the Constitution*, II., The Crown, Part II., p. 166.)

#### Article 64.

The judicial power of the Irish Free State  
(*Saorstát Éireann*) shall be exercised and justice

*administered in the public Courts established by the Oireachtas by judges appointed in manner hereinafter provided. These courts shall comprise Courts of First Instance and a Court of Final Appeal to be called the Supreme Court. The Courts of First Instance shall include a High Court, invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal, and also Courts of local and limited jurisdiction with a right of appeal as determined by law.*

[See notes, Article 6.]

#### **Article 65-**

*The judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution. In all cases in which such matters shall come into question, the High Court alone shall exercise original jurisdiction.*

[See notes, Article 6.]

#### **Article 66.**

*The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve questions as to*

*the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever: Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.*

[See notes, Article 6.]

#### **Article 67.**

*The number of judges, the constitution and organisation of, and distribution of business and jurisdiction among, the said courts and judges, and all matters of procedure shall be as prescribed by the laws for the time being in force and the regulations made thereunder.*

#### **Article 68.**

*The judges of the Supreme Court and of the High Court and of all other courts established in pursuance of this Constitution shall be appointed*



*by the Representative of the Crown on the advice of the Executive Council. The judges of the Supreme Court and of the High Court shall not be removed except for stated misbehaviour or incapacity, and then only by resolutions passed by both Dáil Eireann and Seanad Eireann. The age of retirement, the remuneration and the pension of such judges on retirement and the declarations to be taken by them on appointment shall be prescribed by law. Such remuneration may not be diminished during their continuance in office. The terms of appointment of the judges of such other courts as may be created shall be prescribed by law.*

[See notes, Article 6.]

#### **Article 69.**

*All judges shall be independent in the exercise of their functions, and subject only to the Constitution and the law. A judge shall not be eligible to sit in the Oireachtas, and shall not hold any other office or position of emolument.*

[See notes, Article 6.]

#### **Article 70.**

*No one shall be tried save in due course of law, and extraordinary courts shall not be established,*

*save only such Military Tribunals as may be authorised by law for dealing with military offenders against military law. The jurisdiction of Military Tribunals shall not be extended to or exercised over the civil population save in time of war, or armed rebellion, and for acts committed in time of war or armed rebellion, and in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction.*

See notes, Article 6, and the references therein to the judgment of Lord Chief Justice Molony in *Rex v. Allen*. The punishment and procedure for the maintenance of discipline in a large body of troops are contrary to the law of the land and the principles embodied in Article 6 of the Constitution. Such punishment and procedure are legalised by statutes which bring into force a code of military law. The military law and the military tribunals referred to in this Article are institutions created by law and reorganised by law. They must be distinguished from martial law and courts-martial in the usual acceptance of these terms. Martial law, as distinguished from military law, is the assumption by officers of the Crown of absolute power exercised by military force for the suppression of

an insurrection and the restoration of order and lawful authority. The officers of the Crown are justified in any exertion of physical force extending to the destruction of life and property to any extent and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable civilly and criminally for such excess. They moreover are not justified in inflicting punishment after resistance has been suppressed, and after ordinary courts of justice can be re-opened. The courts-martial, as they are called, by which martial law in this sense of the word is administered are not, properly speaking, courts-martial or courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary powers assumed by the Government. Acts of Indemnity are usually passed to excuse all breaches of the law committed in suppression of a rebellion. It is a common law duty incumbent on every man whether he be soldier or civilian—a soldier retaining during such service his special military obligations—to use any degree of physical force that may be required for the suppression of a violent insurrection. (See Fitzjames Stephen's *History of the Criminal Law of England*, pp. 213-216.) The provision that the jurisdiction of military tribunals (established by statute) shall not be extended to, or exercised over, the civil population save in special conditions set

forth, and shall not be exercised over the civil population or any area in which all civil courts are open or capable of being held, is an enunciation, and in some degree an extension of, the doctrine governing the action of military courts in an area in which courts of justice are open. In *exparte* Marais (1902, A. C., p. 102) it was argued before the Judicial Committee of the Privy Council that the moment it appeared that the ordinary course of law could be, and was being, maintained, a state of war did not exist and martial (military) law could in that case not be applied to civilians. It was, however, decided that the fact that for some purpose some tribunals had been permitted to pursue their ordinary course was not conclusive that war was not raging. Under the provisions of this Article, however, all civil courts in the area must be open or capable of being held to oust the jurisdiction of military tribunals over the civil population in time of war or armed rebellion.

#### **Article 71.**

*A member of the armed forces of the Irish Free State (Saorstát Éireann) not on active service shall not be tried by any Court-martial or other Military Tribunal for an offence cognisable by the Civil Courts, unless such offence shall have been brought expressly within the jurisdiction of Courts-martial*

*or other Military Tribunal by any code of laws or regulations for the enforcement of military discipline which may be hereafter approved by the Oireachtas.*

[See notes, Article 46.]

This Article embodies provisions incorporated in the British Code of Military Law enacted every year, and for one year under the title of the Army Discipline Act. These provisions are aimed at limiting as far as possible the power conceded to the Crown by the legalisation of the military code—in which it is provided that nothing therein contained shall be construed to exempt any officer or soldier from being proceeded against by the ordinary course of law ; that when he is accused of any offence against a subject of the realm punishable by the known laws of the land he shall be delivered to the civil magistrate, and moreover that nobody shall by such code be subjected to suffer any punishment extending to life or limb, or be kept in penal servitude for any crime which is not expressed to be so punishable by the Act itself, nor shall be punished in any manner, or under any regulations which shall not accord with its provisions. Sir Fitzjames Stephen directs attention to the awkward position of soldiers acting under the orders of their military superiors. By the Army Discipline Act they are bound to execute any lawful order they may receive from

their military superior, and an order to fire upon a mob is lawful if such an order is reasonably necessary. An order to do more than might be reasonably necessary for the dispersion of rioters would not be a lawful order. The hardship upon soldiers is that if a soldier kills a man in obedience to his officer's orders, the question whether what was done was more than was reasonably necessary has to be decided by a jury probably upon a trial for murder, whereas if he disobeys his officer's orders to fire because he regards them as unlawful the question whether they were unlawful as having commanded something not reasonably necessary would have to be decided by a court-martial upon the trial of the soldier for disobeying orders; and for obvious reasons the jury and the court-martial are likely to take different views as to the reasonable necessity, and therefore as to the lawfulness, of such an order. "The inconvenience," writes Sir Fitzjames Stephen, "of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law and on the other the discipline of the Army." (See Sir Fitzjames Stephen's *History of the Criminal Law of England*, I., pp. 200-206.)

**Article 72.**

*No person shall be tried on any criminal charge without a jury save in the case of charges in respect of minor offences triable by law before a Court of Summary Jurisdiction and in the case of charges for offences against military law triable by Court-martial or other Military Tribunal.*

Blackstone has termed the system of trial by jury as the most transcendent privilege for which any subject can wish. Hallam writes that trial by jury is the one considerable fundamental privilege surviving the shocks of every revolution, and the standing record of primeval liberty. The arbitrary interference of the Star Chamber with trial by jury elicits Hallam's eulogium of the jury system. "That primeval institution," he writes, "those inquests by twelve true men, the unadulterated voice of the people responsible alone to God and their conscience, which should have been heard in the sanctuaries of justice as fountains springing fresh from the lap of earth became, like waters constrained in their course by art, stagnant and impure; until this weight that hung upon the Constitution should be taken off there was literally no prospect of enjoying with security those civil privileges which it held forth." (Hallam's *Constitutional History of England*, I., pp. 223-224.) There is a curious

record of Edward IV's reign which completely proves how trial by jury was then, and had long been, regarded as a constitutional privilege. The rolls of Parliament for the reign of Edward IV contain a petition from two persons—Henry Bodrugan and Richard Bonnethon—on a charge of felony, and provided that if the said Henry and Richard were by their examination found guilty they then should have such judgment and execution as they should have had if they were of the same attain by the trial of twelve men, and like forfeiture to be in that behalf. The accused refused to appear and were convicted by default. They therefore petitioned the Crown that the judgment might be annulled, on the ground that a trial by justices in this mode was unknown to the laws of England and was a novel and dangerous innovation. The king granted their prayer, and thus affirmed the principle of the indefeasible right of the subjects to be tried, as they have been accustomed, by a jury of their peers. (See Creasy's *English Constitution*, pp. 269-270.) Professor Courtney Kenny, while leaning to the view that trial by a judge without a jury is a better method than trial by a judge and jury, says: "In criminal cases it is not so important that the verdict should be accurate, as that it should be humane; to let some guilty man escape is a less evil than to punish an innocent man. Consequently in all criminal accusations that are of



any gravity the protection afforded by trial by jury is a privilege worthy of the eulogium pronounced upon it by Blackstone." (*Outlines of Criminal Law*, p. 473.) Sir Fitzjames Stephen in pronouncing in favour of trial by jury in criminal cases seems to agree with Bentham in the seeming paradox that it is even more important that the administration of justice should be esteemed to be pure than that it should actually be so. Sir Fitzjames Stephen writes that although he does not think that trial by jury is more just than that by a judge would be it is generally considered to be so, and not unnaturally. Though the judges are, and are known to be, independent of the Executive Government, it is naturally felt that their sympathies are likely to be on the side of authority.

The public at large feel more sympathy with jurymen than they do with judges, and accept their verdicts with much less hesitation and distrust than they would feel towards judgments however ably written or expressed. Trial by jury interests large numbers of persons in the administration of justice, and makes them responsible for it. It moreover saves judges from the responsibility which, to many men, would appear intolerably heavy and painful, of deciding simply on their own opinion on the guilt or innocence of the prisoner.

The Transitory Provisions, Articles 73-83 of the Constitution of the Irish Free State do not come

within the compass of this work, with the exception of Article 81, which is as follows :—

After the date on which this Constitution comes into operation the House of the Parliament elected in pursuance of the Irish Free State (Agreement) Act, 1922 (being the constituent assembly for the settlement of this Constitution), may, for a period not exceeding one year from that date, but subject to compliance by the members thereof with the provisions of Article 17 of this Constitution, exercise all the powers and authorities conferred on Dáil Éireann by this Constitution, and the first election for Dáil Éireann under Articles 26, 27 and 28 hereof shall take place as soon as possible after the expiration of such period.

This Article has been explained in the notes on the Preamble of the Constitution of the Irish Free State Act, 1922, and the three sections of that Act.

### PART III.

ARTICLES of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule of the Constitution of the Irish Free State Act, 1922.

1. *Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.*

2. *Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative*

*of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.*

3. *The representative of the Crown in Ireland shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments.*

4. *The oath to be taken by Members of the Parliament of the Irish Free State shall be in the following form :—*

*I . . . . do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to H.M. King George V, his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.*

5. *The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set-off or counter-claim, the*

*amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.*

6. *Until an arrangement has been made between the British and Irish Governments whereby the Irish Free State undertakes her own coastal defence, the defence by sea of Great Britain and Ireland shall be undertaken by His Majesty's Imperial Forces. But this shall not prevent the construction or maintenance by the Government of the Irish Free State of such vessels as are necessary for the protection of the Revenue or the Fisheries.*

*The foregoing provisions of this Article shall be reviewed at a Conference of Representatives of the British and Irish Governments to be held at the expiration of five years from the date hereof with a view to the undertaking by Ireland of a share in her own coastal defence.*

7. *The Government of the Irish Free State shall afford to His Majesty's Imperial Forces :—*

(a) *In time of peace such harbour and other facilities as are indicated in the Annex hereto, or such other facilities as may from time to time be agreed between the British Government and the Government of the Irish Free State; and*

(b) *In time of war or of strained relations with a Foreign Power such harbour and other facilities as the British Government may require for the purposes of such defence as aforesaid.*

8. *With a view to securing the observance of the principle of international limitation of armaments, if the Government of the Irish Free State establishes and maintains a military defence force, the establishments thereof shall not exceed in size such proportion of the military establishments maintained in Great Britain as that which the population of Ireland bears to the population of Great Britain.*

9. *The ports of Great Britain and the Irish Free State shall be freely open to the ships of the other country on payment of the customary port and other dues.*

10. *The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of Police Forces and other Public Servants who are discharged by it or who retire in consequence of the change of government effected in pursuance hereof.*

*Provided that this agreement shall not apply to members of the Auxiliary Police Force or to persons recruited in Great Britain for the Royal Irish Constabulary during the two years next preceding the*

date hereof. The British Government will assume responsibility for such compensation or pensions as may be payable to any of these excepted persons.

11. Until the expiration of one month from the passing of the Act of Parliament for the ratification of this instrument, the powers of the Parliament and the government of the Irish Free State shall not be exercisable as respects Northern Ireland and the provisions of the Government of Ireland Act, 1920, shall, so far as they relate to Northern Ireland remain in full force and effect, and no election shall be held for the return of members to serve in the Parliament of the Irish Free State for constituencies in Northern Ireland, unless a resolution is passed by both Houses of the Parliament of Northern Ireland in favour of the holding of such elections before the end of the said month.

12. If before the expiration of the said month, an address is presented to His Majesty by both Houses of the Parliament of Northern Ireland to that effect, the powers of the Parliament and Government of the Irish Free State shall no longer extend to Northern Ireland, and the provisions of the Government of Ireland Act, 1920, (including those relating to the Council of Ireland) shall so far as they relate to Northern Ireland, continue to be of full force and effect, and this instrument shall have effect subject to the necessary modifications.

*Provided that if such an address is so presented a Commission consisting of three persons, one to be appointed by the Government of the Irish Free State, one to be appointed by the Government of Northern Ireland and one who shall be Chairman to be appointed by the British Government shall determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission.*

13. *For the purpose of the last foregoing article, the powers of the Parliament of Southern Ireland under the Government of Ireland Act, 1920, to elect members of the Council of Ireland shall after the Parliament of the Irish Free State is constituted be exercised by that Parliament.*

14. *After the expiration of the said month, if no such address as is mentioned in Article 12 hereof is presented, the Parliament and Government of Northern Ireland shall continue to exercise as respects Northern Ireland the powers conferred on them by the Government of Ireland Act, 1920, but the Parliament and Government of the Irish Free State shall in Northern Ireland have in relation to*



*matters in respect of which the Parliament of Northern Ireland has not power to make laws under that Act (including matters which under the said Act are within the jurisdiction of the Council of Ireland) the same powers as in the rest of Ireland, subject to such other provisions as may be agreed in manner hereinafter appearing.*

15. *At any time after the date hereof the Government of Northern Ireland and the provisional Government of Southern Ireland hereinafter constituted may meet for the purpose of discussing the provisions subject to which the last foregoing article is to operate in the event of no such address as is therein mentioned being presented and those provisions may include :*

*(a) Safeguards with regard to patronage in Northern Ireland :*

*(b) Safeguards with regard to the collection of revenue in Northern Ireland :*

*(c) Safeguards with regard to import and export duties affecting the trade or industry of Northern Ireland :*

*(d) Safeguards for minorities in Northern Ireland :*

*(e) The settlement of the financial relations between Northern Ireland and the Irish Free State.*

(f) *The establishment and powers of a local militia in Northern Ireland and the relation of the Defence Forces of the Irish Free State and of Northern Ireland respectively :*

*and if at any such meeting provisions are agreed to, the same shall have effect as if they were included amongst the provisions subject to which the Powers of the Parliament and Government of the Irish Free State are to be exercisable in Northern Ireland under Article 14 hereof.*

16. *Neither the Parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school or make any discrimination as respects state aid between schools under the management of different religious denominations or divert from any religious denomination or any educational institution any of its property except for public utility purposes and on payment of compensation.*

17. *By way of provisional arrangement for the administration of Southern Ireland during the*

*interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof.*

18. *This instrument shall be submitted forthwith by His Majesty's Government for the approval of Parliament and by the Irish signatories to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland, and if approved shall be ratified by the necessary legislation.*

The relations between these Articles of Agreement—"the Scheduled Treaty" and the Constitution of the Irish Free State Act—have been the subject of exposition in Part I. and Part II. of this treatise.

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